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Maryland. Reports. Court of Appeals.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

BY RICHARD W. GILL, *Attorney at Law,*

AND

JOHN JOHNSON, *Clerk of the Court of Appeals.*

CONTAINING CASES IN 1829.

INCK & ALLEN

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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. RICHARD TILGHMAN EARLE, Judge.
Hon. WILLIAM BOND MARTIN, do.
Hon. JOHN STEPHEN, do.
Hon. STEVENSON ARCHER, do.
Hon. THOMAS BEALE DORSEY, do.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's*, *Charles* and *Prince George's* Counties.

Hon. JOHN STEPHEN, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. JOHN ROUSBY PLATER, do.

SECOND JUDICIAL DISTRICT—*Cecil*, *Kent*, *Queen Anne's* and *Talbot* Counties.

Hon. RICHARD TILGHMAN EARLE, Chief Judge.
Hon. LEMUEL PURNELL, Associate Judge.
Hon. PHILEMON B. HOPPER, do.

THIRD JUDICIAL DISTRICT—*Calvert*, *Anne Arundel* and *Montgomery* Counties.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. CHARLES J. KILGOUR, Associate Judge.
Hon. THOMAS H. WILKINSON, do.

FOURTH JUDICIAL DISTRICT—*Caroline*, *Dorchester*, *Somerset* and *Worcester* Counties.

Hon. WILLIAM BOND MARTIN, Chief Judge.
Hon. ARA SPENCE, Associate Judge.
Hon. WILLIAM TINGLE, do.

FIFTH JUDICIAL DISTRICT—*Frederick*, *Washington* and *Allegany* Counties.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. ABRAHAM SHRIVER, Associate Judge.
Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore* and *Harford* Counties.

Hon. STEVENSON ARCHER, Chief Judge.
Hon. CHARLES W. HANSON, Associate Judge.
Hon. THOMAS KELL, do.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. WILLIAM M'MECHEN, Associate Judge.
Hon. ALEXANDER NISBET, do.

ATTORNEY GENERAL.

ROGER B. TANEY, *Esquire.*

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

DECEMBER TERM, 1829.

Pawson's Adm'rs *vs.* Donnell. Donnell *vs.* Pawson's Adm'rs.

It is the unquestionable and exclusive right of the Jury to decide on facts, of the existence of which, contradictory testimony is adduced.

The owner of a ship and cargo has the uncontrolled power of breaking up, or changing the voyage.

The principles which should govern such cases, in the absence of all commercial usage on the subject, and by which the effect of its action on the contract of the ship master or supercargo with the ship owner, is to be determined, are

1st. If by the exercise of this privilege a special injury is done to either, the ship owner must bear the loss, and make a reasonable indemnity.

2. If by the change of the voyage, the captain or surpercargo be necessarily discharged from the performance of all the duties, for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished.

3. If a part of the duties have been executed, then such a proportion of the stipulated compensation should be allowed, as appears just on comparing the services rendered, with those which remain unperformed. For the interpolated part of the voyage, the usual compensation must be paid. The parties should be placed, as nearly as may be, in the same condition in which they would have stood, had a previous contract for the voyage as changed, been entered into between them. To all the customary emoluments of a captain, or supercargo, on such a voyage, are those officers respectively entitled.

A ship master, who was also the supercargo, was directed to proceed with his ship to several ports; his compensation, in addition to monthly wages, was a sum certain, with a privilege of bringing home a specified quantity of merchandize from one of such ports. After a part performance of the voyage, the ship owner changed its direction, and shortened it; so that the port at which the privilege might have been exercised, was not visited by the ship; before the termination of the voyage, the ship master died. **Held** that the privilege was so inseparably connected with the vessel's destination to the particular port, at which it was to have been exercised, that upon its ceasing to be one of the *termini* of the voyage, the privilege of necessity expired, and that the sum certain stipulated to be paid the captain had relation to the voyage as originally contemplated, and was therefore subject to abatement, in the discretion of the Jury. *First*, for the alteration of the voyage, if they believed, that the ship master's labour and responsibility were thereby lightened; and, *secondly*, for that portion of his contemplated services, which were lost by his death.

The misconduct of a captain or supercargo, which produces neither injury nor inconvenience to his employer, forms no defence to the payment of his wages.

The consignees selected by a ship master or supercargo in a foreign port, according to the usual course of trade, and in good faith, are so far the agents of the owners of the ship and cargo, that upon the death of the captain or supercargo, his representatives are not responsible for the consequences of the neglect or misconduct of such consignees, in the execution of their agency after his death not imputable to instructions given in the life of such captain or supercargo.

A shipment of merchandize, whose exportation is prohibited, made by a supercargo for acconnt of his principal, is at his own risk, and if seized and condemned at the place of exportation, the supercargo must bear the loss.

The acceptance by a ship owner of the letters and invoices sent to him by the consignees of his ship in a foreign port, is not such a ratification of the acts of those agents, as would throw a loss arising from the seizure of merchandize exported against the laws of the port of shipment by them, for his account, upon such ship owner.

These were Cross Appeals from *Baltimore* County Court, from a judgment rendered in an action of *Assumpsit* in favour of the plaintiffs, (the appellants in the *first* and appellee in the *second* of these appeals) against the defendant (the appellee in the *first* and appellant in the *second* of these appeals.) The declaration contained two counts—One for work and labour, &c. goods, &c. sold and delivered, money lent, and for money had and received; and the other on an *insimul computassent*, between the defendant and the plaintiff's intestate. The defendant pleaded *non assumpsit*, and issue was joined. It was agreed between the parties, "that the defendant may give in evidence under his plea, any items of account which he may have in bar of the plaintiff's claim, and which he might legally set off, or give in evidence, had he filed an account in bar or given regular notice of set off"—Also, "that all errors in the pleadings be mutually released, and that each party shall be at liberty to give any special matter in evidence under the issue joined." Also, "that by the shipping articles entered into in relation to the voyage referred to in this case, *John C. Pawson* was to receive the sum of sixty dollars per month, as captain of the ship *Chesapeake;* and that the sum of $2000, also referred to in these proceedings, was a compensation agreed to be paid to him, as stated in the letter of instructions, dated the 18th of November, 1819."

1. At the trial of this cause, the plaintiffs read in evidence, by consent, the following letters of instructions: the first dated *Baltimore* the 18th of November, 1819, from the defendant to the plaintiffs' intestate, *John C. Pawson*, viz:

"With my ship, Chesapeake, of which you are commander, you will proceed with all possible despatch, to the port of *London.* On your arrival, you will deliver my letters to *John Horstman*, Esq. to whom your ship and cargo are consigned. In the discharge of the cargo lose no time, and be careful to have it delivered in good order. It may be advisable, that immediately on arrival, you will engage sufficient ballast for your ship, and in every other respect provide what may be necessary to perform a long voyage. When so prepared, apply to Mr. *Horstman*, who will deliver you, on my account, eight thousand doubloons, which you will endeavour to ship on board without the knowledge of your crew. If they are under a belief that you have no specie, less danger may be apprehended from them; but I recommend to you never to be off your guard. With the ship, and the coin on board, you will proceed to the port of *Coquimbo*, in *Chili*, for the purpose of loading entirely with copper, and with it proceed to *Canton;* there dispose of it, and with the proceeds, load your ship agreeably to the list I have furnished, and return with the same direct to me here. On your arrival from *London* at *Coquimbo*, you must not let it be known the quantity of copper you want, nor of your having only doubloons to purchase it. In the purchase of the copper, if made known how much you wanted, the price would be raised on you, and in relation to the doubloons, if it should be known that you have nothing else to purchase with, it might have the effect of reducing their value. There can be no doubt, from the best information I have, that they will bring $17¼, and may exceed that by receiving for them the coined dollars under the present government there. All these points you must attend to. If you have the means of completing the purchase, you must put on board at least 12,200 *quintals*. It may be necessary to apprise you, that much benefit may accrue by your attending and making the proper arrangements for receiving and weighing the copper. I suppose it to be useless to mention the necessity of discharging from the ship every pound of ballast, or useless matter on board of her, before you take the copper on board, because every pound so discharged, enables you to put in place thereof a pound of copper. Since writing the above, on examining letters from *Chili*, dated in January last, it appears there is a paper currency, depreciated in its value—this being the case, and that this depreciated paper is payable and receivable for the products of the country, I say, if this is the case, much benefit might be made by selling the doubloons for the paper money; but you might find that with the coin you could even do better to purchase, and pay in it, than to first sell your coin for the depreciated currency, and to purchase and pay with it. In all these points, you are to make your estimates and calculations. About two years since, I sent my schooner *Midas*, Capt. *Dickinson*, with *Edward M'Clure*, supercargo, who loaded the schooner at *Coquimbo*, with copper, and despatched her to me. *M'Clure* remained at *Valparaiso*, to dispose of a part of the outward cargo then unsold, and close the entire business of the voyage. He would certainly be there until the month of September, and he may still be at *Valparaiso* on your arrival at *Coquimbo*. Should you see him, and he has any funds of mine, or that he has departed from thence, and you find he has placed any of my property in the hands of any person there, in either case, I authorise and empower you to receive and carry it with you, either in copper or *Spanish* dollars, *of the old coin.* Mr. *Richard R. Boughan*, residing at *Valparaiso*, will give you every information in relation to the affairs of *M'Clure*, should he have left that country before you arrive. *Boughan* ought to have property of mine in his hands from a former transaction, which I authorise you to receive from him also. *Boughan* may be able to give you useful information. Be particular in the purchase of every article in *Canton*, to have them of the very best quality, and more particularly that the teas are so. To prevent misunderstanding, I deem it necessary to state your compensation to be two thousand dollars, payable on your return, with a privilege from *Canton*, not to exceed twenty-five tons, but it is to be understood that you are not to put any copper or heavy article on board at *Chili*, as my views are that you completely load her there with copper, and that only for my account. After my property and your privilege are on board, and the ship should not be full, if freight offers deliverable here, you will accept it.

"Should you fail in procuring copper at *Chili*, you will proceed in the ship with the doubloons direct to *Batavia*, where they are rated as high as in *Chili*, and with them purchase an entire cargo of coffee, which will require with proper storage from 8,500 to 9,000 picols. This quantity was brought in her by Captain *Munn*, but she was full in every part. Do not purchase a picol of sugar; and should your funds prove insufficient to fill her, I authorise you to draw bills for my account on *Messrs. Baring, Brothers & Co. of London, or on Messrs. Hope & Co. of Amsterdam.* When you complete your business in *Batavia*, you will proceed from thence direct to this port. In stating your privilege, it is to be understood the twenty-five tons are measurement, and if in weighty articles, twenty-five thousand pounds.

The other dated *Baltimore*, the 26th December, 1819, from the defendant to the plaintiff's intestate, viz:

"I think it is probable you are this day in London, notwithstanding I have concluded to address you, and to take the chance of its reaching you before you depart from thence. The object is to state to you, that from mature reflection, supported by various calculations, resulting in a conviction that the voyage will turn out to better advantage by returning direct from the coast of *Chili* to *Baltimore* with copper, than to proceed with it from thence to *Canton*, as originally intended. I need not remark to you the great difficulty and delay (and without an adequate profit) of realizing a *Canton* cargo in this market. It is not to be accomplished, and I would consequently be compelled to send it from hence to *Europe*, where no gain can be calculated upon. I therefore revoke and countermand the orders I gave to you to proceed from *Chili* to *Canton*, *and now substitute that you will return with the ship and cargo of copper direct from the coast of* Chili to *Baltimore*. As relates to the investment and disposal of your own funds, you must use your own discretion by investing it in copper or any thing else, and bringing it with you in the ship—the copper may (as I hope it will) be bought on terms that will, with my funds and yours, load the ship very deep, but if necessary you must load her very deep. Should you fail in getting copper on the coast of *Chili*, you will immediately, on finding it so, proceed from thence to *Samarang*, in the Island of *Java*, and there invest my funds and your own in coffee, (no other article of the produce of the Island will answer) and proceed from thence direct to *Baltimore*. The government of *Batavia* may object to your loading at *Samarang*, being an out port, but you must use every means in your power to obtain from the government a permission, as you will be able to put on board coffee at *Samarang*, two or three dollars pr. picol less than at *Batavia*."

The plaintiffs also offered in evidence that the ship *Chesapeake*, at the date of the said letter, and before, was owned by Donnell, who continued to be the owner of the said ship during the voyage hereinafter mentioned, and until and after her return to *Baltimore*, as hereinafter stated—that *Pawson*, now deceased, was master and supercargo of the said ship, at the date of the said letter, and so continued until his death at *Coquimbo*, as hereinafter mentioned. That the said vessel sailed on the said voyage from the port of *Baltimore*, November 19th, 1819, and arrived at *London* January 25th, 1820. That she sailed on the 4th day of May, 1820, from *London* for *Coquimbo*, and arrived there on the 15th of August, 1820, and sailed from *Coquimbo* for *Guasco* in January 19, 1821, arrived at *Guasco* January 21, 1821, and continued there until January 29, 1821, when she sailed for *Baltimore*. That, after being out only six hours, *the ship sprung aleak*, and put back to *Guasco*, where she remained until February 7, 1821, when she sailed for *Coquimbo*, and remained there until July 9, 1821, when she sailed for *Valparaiso*, where she arrived on the 12th July, 1821, and remained there until the 19th of that month, when she sailed for *Baltimore*, where she arrived October 1, 1821. That *Pawson* died at *Coquimbo*, December 4th, 1820, when the mate, *Thomas A. Lane*, took charge of the ship, and continued master and commander until she returned to *Baltimore*, as above stated.

The plaintiffs' then offered and read in evidence, the following letters and papers, which were admitted to be in the handwriting of the respective parties thereto, viz: A letter from the plaintiffs' intestate to the defendant, dated London, the 7th of February, 1820.

"After a very long and fatiguing passage, I arrived in the river on the 23d ult. without any material damage—In consequence of our ship's heavy draught of water, we were delayed several days in getting up. We are now about two thirds discharged, and proceeding with all possible despatch. As the ship wants caulking in the bends and upperworks, and a new beam in her (one of them being broken entirely off) I have concluded to put her into a dry dock where it can be done with more despatch and facility, and will not increase the expense above £5, and it will afford a cheap opportunity to examine her bottom, as the copper may have been injured when she lost her rudder. I am sorry to find that doubloons cannot be got at the price you contemplated, and that the quantity cannot be procured in *London*—they have only yet got about one third of the number wanted, but have no doubt they can be obtained from *France* and *Holland*, they, by the last accounts from *Paris*, are quoted lower than they cost here, from which circumstance Mr. *Horstman* thinks they are plenty there—the price here is 75 1-6 per oz.

"I have had the pleasure to receive your letter of the 26th December, in which you are pleased to alter the original intention of the voyage, which will be cheerfully and strictly attended to, and if on my arrival at *Chili*, I should find it necessary to proceed to the island of *Java*, no exertions shall be wanting to have your wishes fulfilled in getting the cargo of coffee only at *Samarang*."

Another letter from the plaintiffs' intestate to the defendant, dated *London*, the 27th of April, 1820.

"On the 24th inst. Mr. *Horstman* addressed a letter to me, stating that in consequence of the advanced price of doubloons, and the probability that the flour would not produce so great a sum as you calculated on, the funds you had provided him with, would not be sufficient to fulfil your order in the purchase of the eight thousand doubloons which I am directed to receive from him, and requested me to state in writing what I thought best to be done—In answer to which I wrote him that in my opinion had you foreseen or supposed any deficiency such as above mentioned, you would not have ordered a less quantity of doubloons but would have made the requisite provision to obtain the full quantity of eight thousand. I was the further confirmed in this opinion by reflecting that your only object in sending the ship to *London* was to obtain the doubloons, and to be disappointed therein would frustrate the ultimate object of the voyage you had in view. I was, therefore, clearly of the opinion that you would expect him to supply the deficiency (which was about 950 doubloons) so that your ship might proceed without further delay. With this answer he was satisfied, and continued the purchase, and has now ready 7650 doubloons, leaving a deficiency of 350, which he thinks can be obtained in one or two days. Under these circumstances, we have fixed on the first day of May for the departure of the ship, with determination of taking what may then be deficient, in dollars, rather than incur further expense by delay. In consequence of the scarcity of doubloons, I have thought it adviseable to invest my own funds in merchandize, in hopes that it may do as well, and because I would not interfere in any manner with your business, I therefore request that you will effect insurance from hence to *Coquimbo*, on the following merchandize and amount: 1 bale 8 cases *British* piece goods," &c. the whole amounting, with commission, &c. to £1115 13 3.

"I shall send copies of the invoices to my family, in case they should be necessary. The circumstance of the crew nearly all running away, after I had paid them the month's advance they were to receive here, and my being obliged to advance others two months' pay, this long and unavoidable detention, and the great necessities of the ship in sails, cables, &c. which was indispensable for the voyage, has added greatly to the disbursements, the bills of which Mr. *Horstman* will forward to you; but being now supplied, I shall be careful to keep the expenses for the remainder of the voyage, as low as possible, which I trust will appear to your satisfaction in the event."

A letter from *Horstman* to the plaintiffs' intestate, dated *London*, the 24th of April, 1820.

"You have been verbally acquainted by me of the difficulties which have arisen since Mr. *John Donnell* despatched the *Chesapeake* to my address with a cargo of flour, and with order to invest the proceeds, and a credit of £21,000, on Messrs. *Varkevessar*, *Derrapool & Brown*, of Rotterdam, in the purchase of 8000 doubloons.

"You are aware that the literal execution of this order has become impossible by circumstances. You know that of the flour I have only been able to sell about 700 bbls. and that the remainder remains on my hands—that I cannot, for the present, sell it, and that the ultimate proceeds of the 4721 bbls. is uncertain. You have been eye-witness of the impossibility of getting the doubloons otherwise than gradually, and this part of the business has only lately taken a turn by the unexpected arrival of about 1600 doubloons from the *Mediterranean*, and think the remainder, (about 900) or very near, may now be had. But the £21,000, and the amount of the 700 bbls. which are sold, are not, by far, sufficient for the draft of Mr. *Donnell* for £1160, to your order, together with the ship's expenses, and the cost of the 8000 doubloons; and if you judge that, under all the circumstances of the case, it is necessary for Mr. *Donnell's* interest that the deficiency be supplied by me to make up the 8000 doubloons, I am ready to do so, in order to get the vessel away immediately, and to furthering Mr. *Donnell's* ulterior views in this affair. You will therefore please to say, in writing, what you deem to be for Mr. *Donnell's* interest, and what you wish me to do."

A letter from the plaintiffs' intestate to *Horstman*, dated *London* the 24th of April, 1820.

"Understanding from you that there is a deficiency in the means Mr. *Donnell* has placed in your hands, in order to supply the eight thousand doubloons, I am directed by him to receive from you, which deficiency, it appears, arises from the doubloons being at a more advanced price than he had contemplated, and from the probability that the *Chesapeake's* cargo of flour, which you hold for sale on his account, not producing so great a sum as he calculated on, I have to state to you, as my decided opinion, that had Mr. *Donnell* foreseen or supposed any deficiency, such as above mentioned, he would not have ordered a less quantity of doubloons, but would have made the requisite provision by enlarging the means he has placed at your disposal, so as to supply the full quantity of eight thousand doubloons. I am the further confirmed in this opinion, by the knowledge that the grand object of the voyage he has in view for the *Chesapeake*, depends entirely on obtaining the requisite funds in *London*, (say the eight thousand doubloons) to accomplish which was Mr. *Donnell's* only object in sending the ship to *London*. I am therefore clearly of opinion, that Mr. *Donnell* will not only expect, but esteem it a favor, that you supply that deficiency for his account as soon as possible, so that his ship may, without further delay, proceed on her voyage, and I am confident he will hold himself responsible for the transaction."

A letter from the plaintiffs' intestate to the defendant, dated *London* the 27th of April, 1820.

"I am happy to inform you, that after a very long and tedious delay, Mr. *Horstman* has at length nearly completed your order for the doubloons, having now already purchased 7650. We have fixed the first day of May for the departure of the ship, and if the remainder of the doubloons cannot be purchased in time, we have determined, rather than incur any further delay, to take the amount in dollars.

[This letter then incorporates a copy of the previous letter of same date.]

"May 3d. Since writing the above, we have completed the quantity, and shall proceed on board to-morrow morning. There is a ship just arrived from *Chili*, by which I learn indirectly, there is a great probability of our accomplishing our object there. Mr. *Horstman* will transmit to you the duplicates of the bills for the ship's outfits, which, together with the enclosed, (which accounts for the cash received from him,) will shew the whole amount. I have one passenger, who has paid £100, one half of which I have paid for stores, and divided the other between myself and the ship, which you will find credited on the enclosed."

Another letter from the plaintiffs' intestate to the defendant, dated *Coquimbo* the 15th of August, 1820.

"I arrived here on the 13th inst. after a passage of ninety-three days, all well. I have not yet been able to collect sufficient information to act decisively with respect to loading, and shall not determine until I have heard from *St. Jago* and *Valparaiso*, whither I have written to Mr. *Boughan*, and Mr. *M'Clure*, (who I understand is yet in this country,) for that purpose; the information I get here is, that about 6000 quintals of copper may be got immediately here, and at *Guasco*, a port a little way to the northward of this, and that I could complete the quantity as far as my funds would go, in the course of three months; the price is said to be somewhat lower than hitherto, and I think may be bought for $12, and will stand on board at about $14, or $14¼, with the duties paid. I believe, however, that something may be done to save a part of the duties; the doubloons are worth $17¼ as you supposed, and 8000 amount to $138,000, which will put on board at the above price, upwards of 9600 quintals, or 998,400 lbs. and valuing that quantity at 20 cents, and the doubloons at cost, I am of the opinion will yield a better result than continuing the voyage to *Batavia;* but as there is no ship here wanting copper, I shall not commence the purchase until I make myself better acquainted on the subject, and until I am certain of getting the whole quantity. With respect to the depreciated paper currency you mention in your instructions to me, I find it only receivable by the government in payment for duties, and only for half the amount, they requiring the other half in cash: it may be bought at a discount of twenty per cent. which advantage I shall not neglect to avail myself of. I have not yet learned any thing concerning the state of your business here, under the superintendence of Messrs. *Boughan* and *M'Clure*, but shall take the earliest opportunity of forwarding to you whatever I may learn on the subject."

Another letter from the plaintiffs' intestate to the defendant, dated *Coquimbo*, August 24, 1820.

"Since writing you on the 15th inst. stating that 6000 quintals of copper might be immediately secured; and our whole cargo contracted to be delivered in three months, I have concluded to load here, and hope that it may meet your views and approbation. So large a quantity of copper as I want, cannot ever be procured here at once, and from what I learn from the best authority, there has never been a more favourable opportunity than the present, for obtaining so large a quantity. I have therefore thought it most prudent, and have accordingly secured the 6000 quintals at $12, and have every prospect of getting the balance at the same price, and in the time above mentioned. The copper, at this price, will stand, on board, duties paid, at $14, 14⅓--100. The value of the doubloons are $17¼, and with the funds I have, will put on board upwards of 9600 quintals. Mr. *Boughan* writes me that he has not made any collections for your account, and indeed, says there is very little probability of his ever doing so. He has instituted a law suit against the debtor, who he says is so poor that he does not expect any thing from him, even if he is cast; he speaks also, of great difficulties he has had in ascertaining the amount of the debt, in consequence of some necessary books or papers having been destroyed in the revolutionary wars of this country. Upon the whole, there is very little prospect of getting any thing from him. I have not yet received any communication from Mr. *M'Clure*, (who is married at *Santiago*) but Mr. *Boughan* informs me that he believes Mr. *M'Clure* holds some government paper for your account, and if this intelligence is confirmed, my purchasing copper here offers a favourable opportunity of making use of it to advantage, as it is at twenty per cent. discount, but will be received at par by the government, in payment for half the amount of duties, but the other half must be paid in cash—this arrangement will also increase the quantity of copper, if effected. In my former letter, I informed you that the government here had issued orders that have a direct tendency to encourage desertion of seamen from our ships, in consequence of which I have shared the fate of several others by losing sixteen of my crew, which entirely disables me from proceeding in the discharge and loading my ship—they are now on board one of their brigs of war, and unless captain *Downes* arrives here this evening, as we expect he will, they will succeed in carrying them off. I think, however, that if captain *Downes* should not arrive time enough to prevent this diabolical proceeding, that he will no doubt give me a crew from the frigate."

"Account sales of sundries made by *Edwards & Stewart* to the government of *Chili*, for account of captain *John C. Pawson*, ship *Chesapeake*. August 25, 1820. 45 coils cordage, weighing 113 qrs. 87 lbs. a $20, $2277 3½—and one day and night glass, $30, amounting in the whole, after deducting $92 02 for commissions, to $2215 01½."

A letter from the plaintiffs' intestate to *Lemuel Goddard*, dated *Coquimbo*, the 25th of August, 1820.

"Above you have the account sales of the cordage you shipped on board the *Chesapeake*, which you will perceive I have obtained a good price for. I also sold the spy glass, but the foul air extractor and the compasses yet remain on hand, without any probability of selling them, and if I am obliged to take them to the *United States*, shall deliver them to your order there. My principal object in addressing you now, is to give you an opportunity to make insurance on the amount of your interest in the above transaction. This I think the more advisable, because a chance now offers for conveyance to *England*, and it is quite uncertain if I shall have an opportunity to write to the *United States* for insurance. Our interest, as per agreement, stands thus: Nett amount of sales, $2215 01½. Deduct cost and charges per invoice, $1232 01½—leaving $983 00½—One half of which is $496 04½. Which added to the original costs and charges, $1232 01, makes $1728 05¼.

"Which sum, say $1728 05¼, I leave you to get insured from hence direct to *Baltimore*, where, on the safe arrival of the funds, I hold myself responsible to pay said amount to your order. It was a mere chance I was enabled to get so good a price for the cordage. The fleet from *Valparaiso* on the way to attack *Lima*, put in here, and was very much in want of it, or I fear we should have a poor account of it, and I would advise you not to let our present success induce you to ship any quantity of cordage to this country, as the probability is, it would not sell."

A letter from the plaintiffs' intestate to *Edwards & Stewart*, dated at *Coquimbo* the 19th of August, 1820.

"In consequence of the representations made by you, that six thousand quintals of copper might be immediately bought at $12 per quintal, and your decided opinion that the balance of my cargo may be contracted for at the same price, to be delivered on the first of November, I have determined to load my ship here, and hereby authorise you to purchase the 6000 quintals, and secure the remainder, amounting to between three and four thousand quintals with all possible despatch, on the terms above mentioned, or lower if possible. In making these contracts, I would recommend your particular attention to have them only with men in whom you have perfect confidence, both as to the quality of the copper and to the punctuality of the delivery. It is understood that you secure to me the just and true performance of the said contracts, so that I shall not meet with material delay to my ship. It is also agreed that you are to receive two and a half per cent. commission, and one per cent. storage, amounting to three and a half per cent. on the amount of the purchase. I must also request your particular care and attention to secure every advantage that can be obtained in weighing the copper and in paying the charges and duties. It is also understood that you are not to purchase copper for any other order, until my cargo is completed.

"Understand that the two and a half per cent. is on the amount of the invoice, and the one per cent. on the amount of the copper at first cost, exclusive of duties and other charges."

A letter from *Edwards & Stewart* to the plaintiffs' intestate, dated *Coquimbo* the 4th of September, 1820.

"We have received your letter of this date, in which you request our purchasing for your account from 9 to 10,000 quintals of copper, at or under $12 per quintal. Agreeably to verbal information given you by us, that we thought 6000 quintals might be secured much before the time limited, we have now the pleasure of confirming it by enclosing you herewith, our obligation at sight, for said amount, say six thousand quintals copper, which you may dispose of when you judge most proper. As regards the residue of your order, although we cannot come under an obligation for its purchase, yet we think our success will be almost certain from information we have, and a pledge we make you on not purchasing on any other order until yours' is completed—on this point we can say no more. We accept the commissions as stated by you, two and one half per cent. on cost and charges, and one per cent. on storage on the amount of the purchase of the copper. All contracts made by us come under our responsibility, not only as to the faithful delivery, but likewise as to the quantity of the copper. All copper received is weighed by us in person, and every regard is paid to this branch that the interest of the concern requires."

A letter from the plaintiffs' intestate to the defendant, dated *Coquimbo*, the 4th of September, 1820.

"I have to inform you that your business remains nearly in the same state as when I wrote you on the 24th ult. viz. that I have purchased 6000 quintals of copper, and shall have the remainder, amounting to between three and four thousand quintals, ready by the first of November, at $12 per quintal, which, with the duties and shipping charges paid, will stand on board at about $14 more or less. In this transaction I was determined by reflecting that a pound of copper at that price, would nett in the *United States*, as much profit, and with more certainty, than a pound of coffee, and that the additional expense of pursuing the voyage further would be saved, and I trust that this view of the subject will meet your approbation. I have not yet received any communication from Mr. *M'Clure* respecting your property in his hands, nor can I give you any certain information, except that I have understood that he had invested the government paper which he held in silks, a part of which he sent down the coast for sale, and the remainder he had deposited in this place, but has recently ordered them somewhere else. I shall use my best endeavours to have a settlement with him, if possible, but I think there is no chance whatever, of getting any thing from Mr. *Boughan*. I am yet without a crew: in consequence of the *Macedonian* having a long passage from *Valparaiso* to this place, *Cochrane* had time to carry off the men, and captain *Downes* would not supply me from the frigate, as he thought there was a probability of his having some trouble with *Cochrane*, if he should attempt to obstruct his entrance into *Lima*. He has taken a list of the deserters, and intends to demand them. Understanding that there are plenty of seamen in *Valparaiso*, I have written to the consul there, requesting him to procure me a crew, and send them down by the first opportunity, so that I am in hopes of soon being able to proceed with loading, and shall use every exertion for despatch in my power. As I may possibly not have another opportunity direct to the *United States* shortly, I would thank you when you make insurance on the ship and cargo, also to insure for my account, the same sum which you did me favour to insure from *London* here. I think it probable it will be shipped in silver bullion and copper. As it is necessary to have some light and bulky article to stow with the copper, in order to raise it in the hold as much as possible, I have purchased for that purpose a few hundred hides, and shall increase the quantity to one thousand, if they can be obtained—they cost from 9 to 12 rials per hide, and will average about 28 lbs. It is usual to purchase wood for this purpose, which is attended with considerable expense and trouble, and is afterwards worth nothing, while the hides at the above price will pay a good freight. I have employed Messrs. *Edwards & Stewart*, of this place, as agents to purchase the *Chesapeake's* cargo, of whose integrity and honesty as merchants, I made myself perfectly satisfied of before I engaged with them; their influence with the governor and collector here is very great, from which circumstance I expect great advantages in the payment of the duties, and I have a good prospect of getting through my business without trouble or delay.

"Since writing the above, I have received a letter from Mr. *M'Clure;* he says he has on hand a quantity of silks, which, with the discount on government paper, (with which I understood he paid for them) cost about $5000, and a few other articles which would raise the amount to 1000 more; he has also from 2000 to $2500 in cash, which he promises to put immediately at my disposal; he also offers to make an immediate sale of the silks, &c. for cash and close the concern, if I will authorise him to do so, but it is his opinion, that to force a sale of the silks, &c. for that purpose would be attended with a loss of at least one half, and as I am only empowered by you to receive whatever he may give me, I must leave him to exercise his own discretion with respect to selling the silks, &c. but strongly recommend him to effect a settlement, if possible, while the *Chesapeake* remains here, as I am convinced you are anxious to have it closed.

Another letter from the plaintiffs' intestate to the defendant, dated *Coquimbo* the 4th of November, 1820.

"By the *Two Catharines* I informed you that I had commenced the purchase of the *Chesapeake's* cargo of copper, at $12 per quintal, which will cost on board, duties paid, about $14¼, depending considerably on the amount of that saved by the arrangement with the collector here, and a gain of from five to seven per cent. on the amount of the duties, by paying part of them with the government paper, which is at a discount, though so uncertain that it is dangerous to purchase it until the moment it is to be paid into the custom house. There is now purchased for your account 9500 quintals, nearly 7000 of which is on board, and the remainder in *Guasco*, whither I shall proceed and take it in as soon as I get my crew from *Valparaiso*, which I am daily in expectation of, and hope, in about a month more, to be on my passage for *Baltimore.* We have received accounts here stating that the *United States* had proceeded to take possession of the *Floridas*, and had acknowledged the independence of this country and *Buenos Ayres.* If so, I think it quite likely that a war with *Spain* must ensue, and of course render me liable to capture on the homeward passage, by privateers under *Spanish* colors. Of the truth of this I hope soon to be informed, and if it is the case, I shall endeavour to sail home in company with the *Macedonian*, which ship is shortly expected here from *Lima*, and is to proceed immediately home. I have received from Mr. *M'Clure* the sum of $5500 on your account, to obtain which, he informs me, he sold the greater part of the silks, which in a former letter I mentioned he held at a great loss; he writes me also, that he intends, if possible, to sell the remainder and close the business, though I cannot inform you to what amount he still holds. I wrote him a few days ago to inform him that I expected to sail shortly, that he might make his arrangements accordingly. I have got nothing from Mr. *Boughan*, nor do I think there is any probability that I shall. He writes me that he is paying every attention to the suit he has instituted against the consignee of the *Melanthro*, and has great hopes, from the strong vouchers he has presented, of gaining the cause, but if he does, he has no hopes of recovering any money from the circumstance of the consignee being very poor. With respect to loading the ship, I have paid every attention to have the copper of the best quality, and stowed in the safest manner, but I think it altogether unsafe to put more than 9500 to 10,000 quintals on board, as it is a very laborious cargo from its dead weight and small bulk, and the ship begins now to shew her age. I have purchased about 600 hides, which cost from nine to twelve rials each, to stow with it, for the purpose of raising the weight and increasing the bulk. I shall, however, be guided by my judgment as the ship comes down in the water, and if possible, bring the whole of your funds in copper. If there should be any surplus funds, which will not be more than the $5500 received from Mr. *M'Clure*, I shall bring it in Plata Pina, or silver in bars, the former at $7 56-100, and the latter $7 81-100 per mark of 8 ozs. In my former letters I requested you to insure for my account the sum of $5000. I now have to request you will insure $1000 more. If I find the ship too heavy laden with your copper, I shall curtail my privilege in that article, and bring my funds in silver. I send this across the cordilleras, but I understand there is very little hopes of your receiving it, as the communication is very much interrupted by banditti."

A letter from *Horstman* to one of the plaintiffs, dated *London* the 29th of July, 1822.

"I have to acknowledge your letter of the 18th May, in which you request to be furnished with a copy of the account between the late Captain *Pawson* and myself, and such documents as would enable you to come to a settlement, as acting administrator, with Mr. *Donnell.* In reply I beg to state, that I had not any account running with Captain *Pawson*, as he acted entirely himself; but on reference to my books, I find the following items were paid by me, and repaid by Captain *Pawson*, the 19th April, 1820, viz: Barry, for charts, &c. amounting to

£69 1 2, which were the only pecuniary transactions with him direct.

"In regard to the bills of disbursements of the ship *Chesapeake*, which you mention were never received by Mr. *Donnell*, I find that I sent to Mr. *Donnell*, on the 13th of May, 1820, the following, viz: One letter, 13th May, with account of disbursements of the *Chesapeake*, £2219 13, and a list of the vouchers;—one parcel, containing the vouchers, (original accounts)—one letter from Captain *Pawson* to Mr. *Donnell*—two letters from Captain *Pawson* to different persons, (I think Captain *Hamilton* and Mrs. *Pawson*.) These were sent to *Liverpool* for the purpose of being forwarded, and I find by letter from *Liverpool* that were sent per the *Mary*, which sailed the 15th of May, with the exception of one addressed to Mr. *Donnell*, which were sent per the *Anna Maria*, (the latter is presumed to be the one containing the vouchers.) From Mr. *Donnell* I have received no other letter than of the 18th of November, 1819, brought by Captain *Pawson*, and 26th of December, 1819, enclosing a letter for Captain *Pawson*. Captain *Pawson* had a bill on me, drawn by Mr. *Donnell*, for £1165 9 1, at sixty days, which was due 30th of March 1819, and paid to him. I hope these details will answer your purpose."

A letter from *Edwards & Stewart* to the defendant, dated *Coquimbo* the 8th of December, 1820.

"With sincere regret we have to inform you of the death of our much lamented friend, Captain *John C. Pawson*, who departed this life on the fourth of the present month; to us it is particularly sensible, in consequence of his being, from the first of his attack, until his decease, in a state of torpidity, from the nature and violence of his disorder, which prevented our making any arrangements with him in relation to his affairs at this place. We attribute, as the principal cause of Captain *Pawson's* death, his extreme anxiety on the subject of his crew, the receiving of which he had placed great reliance by a ship which arrived a few days before his decease, from *Valparaiso*, to which place he had written to a mutual friend, to ship him a crew, having lost by desertion the day after his arrival at this port. We were much disappointed at hearing that no men were to be found at *Valparaiso*, from the great enlistments made by the navy agent for the *Chilian* navy, which left us the only and very uncertain resource, of Captain *Downes* supplying him with a *quota* sufficient for taking the ship home. Captain *Downes'* arrival was at that time daily expected, but an arrival from the coast of *Peru*, where the *Macedonian* had gone, brought us sad intelligence of Captain *Downes* not being able to visit this part of the coast for some months. This news created in Captain *Pawson* a very sensible change in his state of health, which had been delicate from his arrival, by great depression of spirits, which was accompanied by a fever, which changed into the gout, entered the stomach, and after being confined four days to his bed, yielded to his Maker the debt of nature, and trust he is enjoying, through the medium of our Saviour, happiness in that world, where, sooner or later, we are all to appear."

Also the extract of a letter from *Edwards & Stewart* to the defendant, dated *Coquimbo*, January 19th, 1821.

"We likewise enclose you herewith account sales of various merchandize brought by Captain *Pawson* from *London*. His accounts, bill of lading for two boxes of *Chinchilla* skins, to your consignment. We also enclose you the bills of the goods for your government. We confess we feel awkwardly situated from our perfect ignorance of Captain *Pawson's* business, and act only from conversations we have had with Capt. *Pawson*, and from our judgment. We presume the property belonged to him which came in the ship, for the sale of which he has got credit. His intention was, as well as we can recollect, to invest the proceeds in 250 quintals of copper, provided the ship would load more than the 10,000 quintals, if on the contrary he intended taking only 150 quintals for his account, the *Chinchilla* skins charged him in his account, and the balance of his funds in silver, if to have been had. This we believe firmly were his views, and on which we should have acted, but fearing compromising ourselves, we have considered it most prudent passing the balance of his account to your credit, and leaving it to your judgment to settle with his relations in the manner you think most equitable and just, founded on the above facts. We recollect Captain *Pawson* stating to us, that the cordage sold to the government was shipped on half profits by some manufacturer in *England*, and in order to throw light upon that part of his business, should you be addressed from *England* by the same, we have enclosed you separate sales of that article."

Also, the extract of another letter from *Edwards & Stewart* to the defendant, dated *Guasco*, January 28th, 1821.

"Enclosed you will receive a bill of lading for 900 pigs of copper, and thirty-six lumps of gold, as likewise another for seventy-four pigs of copper, and one large, and nines mall pigs of bar silver, and sixteen pieces of Pina silver, shipped the former for your sole account, and the latter for account of the late Captain *Pawson;* by the invoices and account which we likewise enclose you, you will perceive that the whole of your funds we have remitted to the best advantage, and we have only to beg you to call to mind, in case that every thing is not exactly correct, the disadvantages we have been under from the sudden death of Captain *Pawson.*"

Also, an extract from another letter from *Edwards & Stewart* to the defendant, dated *Coquimbo*, March 9, 1821.

"As we anticipated, the crew has deserted the ship, and has remaining on board only nine men from the *Constellation.* We hope to get the residue she may want to carry her home. The carpenter of the ship, from a pique he had against Captain *Lane*, and to revenge himself, gave information of the spot where your gold and Captain *Pawson's* silver were stowed on board, to the governor. This was done with so much secrecy by both parties, that we were not aware of the treachery, until the whole was in their possession. It was shipped in *Guasco*, and stowed by Captain *Lane* in the bread locker, under all the bread, without the knowledge of any one on board excepting the carpenter, in whom both he and Captain *Pawson* placed the most implicit confidence. The exportation of virgin silver and gold have been prohibited by the government under confiscation of the property if taken, and many severe penalties inflicted on the parties concerned. Captain *Pawson* intended shipping any small balance he might have in those articles, from their paying better than any other remittance to *America*, from this, hard dollars being at 6½ premium, and ounces at $17¼, so that in shipping either one or the other, you would have experienced a great loss. We are aware we took upon ourselves some responsibility from not having had written instructions from Capt. *Pawson* to ship in these articles your balance, but were actuated for your interest, and knowing Captain *Pawson* would have acted in like manner. We fear the hopes of recovering this property are small, as the law is explicit and severe. We shall make the necessary representations, and send you copies by next opportunity."

And another letter from *Edwards & Stewart* to the defendant, dated *Coquimbo*, July 4, 1821.

"We enclose you the proceedings of the confiscation of the silver and gold found on board the ship, which we are sorry to say was eventually lost, notwithstanding the exertions of Capt. *Ridgely*, Judge *Prevost*, special agent of the *United States* of *America*, and our representations. We are still in hopes that at a future period this property may be recovered, and with this view have thought proper to send you the documents to substantiate any claim you may think proper to institute."

The plaintiffs further offered in evidence, that it was the known custom of trade in *Chili* and at *Coquimbo*, to employ agents on shore in the business intrusted to *Pawson*, and that it was necessary to do so. And also offered in evidence, that the privilege to the captain of twenty-five tons, mentioned in the contract from *Canton* to *Baltimore*, was a valuable privilege, much more so than the like one from *Coquimbo*, and that it was, and is, the usage of trade for the captain, if he does not use his privilege himself, to let it out to others, and even to be paid for it by the owner, if the owner used it for his benefit. That the freight from *Canton* to *Baltimore*, at the time abovementioned, was from thirty to one hundred dollars per ton. The plaintiffs' further offered evidence, that it is the usage of trade, when a captain has such a privilege as is stated in the defendants' first letter of instructions, to wit, of twenty-five tons from *Canton* to *Baltimore*, that this privilege is entitled to a preference even over the owner, in putting the same into the vessel, and that if the captain dies in the course of the voyage, his privilege does not succeed to the next captain, but survives to his representatives.

The plaintiffs further offered in evidence, that on the arrival of the ship here, only 147 quintals of copper were delivered to the plaintiffs, as the share of the said *Pawson*; and they read in evidence, the following order and account, which were admitted by consent—"74 pigs copper, weighing 14,779 lbs. of the estate of Captain *Pawson*, received per the ship *Esther*, Captain *Low*, from *Coquimbo*,"—signed 29th October, 1821, by the defendant.

The plaintiffs also offered in evidence the following accounts:

Dr. *John C. Pawson* (deceased) in account with *John Donnell*. Cr.

To balance per settlement in *London*, Sterg.	£ 3 10 11	
Short credit allowed for passengers from *London*, - - -	25 00 00	
		$126 87
Premium of Insurance to *Maryland Office* on $5166, a 4 p. ct. -	$207 89	
Premium of Insurance to *Patapsco Office* on $6000 a 2¾ p. c. -	166 25	
	374 14	
Common ½ pr. cent. on the sums insured,	55 83	
		429 97
Discounts paid on 16 shares Bank Stock, hypothecat. for $1200 in Nov. 1819, renewed each 60 days, say 14 renewals a 12 80.		179 20
Proportion of landing copper from ship *Chesapeake*, and reshipping on board the *Esther*, total 550,600 lbs. cost $2454 69, which on Capt. *Pawson* 14779 will be		66 00
Freight paid the ship *Esther* from *Coquimbo* to *Baltimore* on 14779 lbs. at 2½ cents per lb.	369 47	
Primage thereon, 5 p.c.	18 47	
Storage, storing, weighing and delivering,	10 00	
		397 94
Amount invoice of copper and bullion shipped by *Edwards & Stewart* for account,		4,694 56
Cronometer cost 80*lstg.*	355 55	
Day and night telescope of *J. Allen*, - - -	22 00	
Horsburg Directory of *Boyd*, - - - - -	24 00	
		401 55
Balance due by J. D. - - -		185 00
		$6,481 18

By wages from 19th Nov. 1819, till 4th Dec. 1820, his decease at $60, - - - - -			$750 00
Dividends drawn by J. D. on 16 shares Bank Stock, one 1½, one $2, - - - - - -			56 00
Transfer by *Edwards & Stewart*, of the balance due by them to Capt. *Pawson*, after his decease, (very improperly to me,) - - -		$7,777 87	
In which was included the proceeds of cordage taken on board for account some person in *London*, to be deducted therefrom,		2,215 18	
			5,562 69
Amount sales of said cordage as above,		2,215 18	
After deducting therefrom for freight from *London* to *Coquimbo*, being a belligerent port, and, an article contraband of war, which subjected my ship and property to confiscation, and annulled my insurance, the weight of cordage as p. sales a $5,	$569 37		
Cost of lumps of gold, shipped as a remitance for proceeds of said cordage, being a prohibited article, and as seized cost, - - -	1452 84		
Edwards & Stewart commiss'n thereon, at 2½ p. cent. - -	36 32		
Expenses incurred by claiming its restoration, - - -	44 16		
		2,102 69	
			112 49
			$6,481 18

N. B. Captain *Pawson* took from my ship such valuable articles as he fancied for the *North Point*—He took from the *North Point* every article, when he left her, for the *Chesapeake*—It is, therefore, nearly out of my power to trace them—But you can certainly show by his papers, the articles he paid for, and such had, of course, a right to take from the *Chesapeake*.

J. Donnell.

2 mos. interest on $165,	- -	$1 65
10 mos. do on 165 70,	- -	8 25
5 mos. do on 1721,	- -	43 10
		$53 00
Interest on 1200 for 18 mos.	- - -	108 00
		$55 00

Received the above $55, which with the $53, interest until his bond fall due, is to be applied by me to the discount, on renewal of his stock note for hypothecated Bank Stock, 17th Nov. 1819. *John Donnell.*

Interest calculated on bonds until due, secured by J. D. and for which he has, in settlement, retained their amount in his hands—the $53 to be applied to paying the discount on *J. C. Pawson's* Stock note at the Office Discount and Deposit, is to be renewed by J. D. and with the $53, and the $55 now received, it is expected will pay the above discount, until his, *J. C. P's* return.

"Sales by *Harrison & Sterett*, for account of the administrators of the late Captain *J. C. Pawson*," in December, 1821 and April and May, 1822, of 14,774 lbs. of copper, amounting, deducting charges, &c. to $2,843 75.

The plaintiffs further offered in evidence bills of lading, and invoice of the shipments at *Coquimbo* and *Guasco*, on the voyage aforesaid. 1. Of 8000 Spanish doubloons shipped by *Horstman* from *London* on the 4th of May, 1820, for the port of *Coquimbo*, to the order of Captain *Pawson*, on account of *John Donnell*. 2. Of 4219 pigs of copper, weighing 8076 quintals, &c. and 411 cow hides, by *Edwards & Stewart* from *Coquimbo*, on the 19th of January, 1821, for account of *John Donnell*. 3. Of two boxes and one bundle of *Chinchilla* skins, containing 456½ dozen, being the property of the late Captain *Pawson*, and consigned to *John Donnell* for the benefit of whom it may concern, by *Edwards & Stewart*, from *Coquimbo*, on the 19th of January, 1821. 4. Of 74 pigs of copper, weighing 147 quintals, &c. one large and nine small pigs of bar silver, and sixteen pieces of Pina silver, weighing 304 marks, one ounce, shipped by *Edwards & Stewart* from *Guasco*, on the 28th of January, 1821, to *John Donnell*. 5. Of thirty-six lumps of gold, weighing 608 castellanos, five tomines, and 900 pigs copper, weighing 1795 quintals, ninety-five lbs. shipped by *Edwards & Stewart* from *Guasco*, dated the 28th of January, 1821, consigned to defendant.

"Invoice of copper and hides shipped by *Edwards* & *Stewart*, on board the *American* ship *Chesapeake*, Captain *Thos. A. Lane*, by order of the late Captain *J. C. Pawson*, bound for *Baltimore*, in the *United States* of *America*, and consigned to *John Donnel*, Esq. merchant, of said place.

4219 pigs of copper, wg. 8076 qqs. 19 lbs. a 12 ds.	$96,914 02¼
246 ox, and 411 cow hides, - - - -	932 01
	$97,846 03¼
Charges, duties, commission, &c. added, - -	19,259 08¾
	$117,106 04

"Invoice of copper and gold shipped in *Guasco*, by *Edwards & Stewart*, on board the *American* ship *Chesapeake*, Captain *Thomas A. Lane*, by order of the late Captain *J. C. Pawson*, bound for *Baltimore*, in the *United States of North America*, and consigned to *John Donnell*, Esq. of said place.

900 Pigs of Copper, wg. 1795 qqs. 95 lbs. at $12, - -	$21,551 03¼	
Storage 1 p. c. - - - -	215 04	
		$21,766 07¼
20 round lumps of gold, wg. 172 castellanos 7½ tomines a 19¼ rs.	416 01	
15 do do wg. 403 do 5½ do a 19 rs.	958 05¼	
1 do do wg. 32 do a 12½ rs.	78	
		1452 06¼
		$23,219 05½
Charges, duties and commission, &c. added,		4,885 03½
		$28,105 01½

"Invoice of copper and silver shipped in *Guasco*, by *Edwards & Stewart* on board the *American* ship *Chesapeake*, Captain *Thomas A. Lane*, bound for *Baltimore*, in the *United States* of *America*, by order of the late Captain *J. C. Pawson*, for acc. and risk of whom it may concern, and consigned to *John Donnell*, Esq. merchant, of said place.

74 pigs of copper, wg. 147 qqls. 79 lbs. a $12,		$1,773 04
Storage 1 p. c.		17 06
1 large and 9 small pigs silver, wg. 115 mks. 1 oz. a $8 p. mk.	$921 00	
16 pieces of pina silver wg. 189 mks. 0 oz.	1488 03	
		$2,409 03"
Charges, duties and commission, &c. added,		493 07½
		$4,694 04½

"Amount of money paid by Captain *Pawson* to the crew of the ship *Chesapeake*, which returned here from *Coquimbo*, $70 59." Signed by *J. D.*

And also proved that the voyage was in effect protracted by the determination to return immediately to *Baltimore*, and not go to *Canton*, as it was much more difficult to obtain a crew for the former voyage than the latter, and the ship was delayed for a long time, for the want of a crew to navigate her to *Baltimore.*

The defendant then offered and read in evidence the following letters, which were read by consent, and admitted to be in the hand writing of the respective parties thereto.

The only letter which appears to have been offered in evidence by the defendant, is one from one of the plaintiff's to the defendant, dated *Baltimore*, 15th May, 1822.

"From a minute investigation of the account you furnished, between yourself and the late Captain *Pawson*, and with a reference to sundry documents in my possession, I have made out the enclosed account. With respect to the $2,000 for compensation, *it appears to have been regularly agreed upon between you and the deceased, as the privilege he was to have, each voyage, in your ships, consequently it is claimed as a right.* The cordage transaction, in your account, is totally inadmissible, the funds which arose from the sale of it, were laid out in bullion, (silver) which remains in *Coquimbo* under seizure, as your gold does, and as you are not known in the transaction at all, it of course remains for settlement between the owner in *London* and the executors of Captain *Pawson.* As to your charging freight on the cordage from *London* to *Coquimbo*, it seems strange indeed. Your ship was going in ballast, and Captain *Pawson* wrote to you that he would take merchandize, having found great difficulty in procuring the number of doubloons you ordered from Mr. *Hortsman.* I find that in 1816, you *permitted* Captain *Pawson* to take goods from other persons *to make up his privilege* in the ship, and as, by his agreement with the owner of the cordage, he was interested in the sales, it became, of course, a part of his venture from thence. It appears that Captain *Pawson* allowed you £25 sterling in the account he furnished before he left *London.* Balance due to you £3 10 11. £50 sterling he laid out for cabin stores. The $55 83 claimed as commission for effecting insurance, you never charged in any similar case. I have not ascertained whether the expenses charged on the copper, are customary or not. You'll observe, that *Captain Pawson's privilege in the ship was not taken by several thousand pounds weight*, of course you will allow for the deficiency, as you have done before."

Mr. *John Donnell* in account with the estate of the late Captain *John C. Pawson.*

Dr.		Cr.	
1819. Nov. 18. To cash paid interest on 16 shares *United States* Bank Stock, hypothecated for $1200 p. your receipt, - - - - -	$109 00	By balance due to you as per account furnished by Captain *Pawson*, in *London*, including £25 sterling, your proportion of passage money,	$15 75
Interest on do. from said date until 15th October, 1821, - - - - -	12 36	Cash on 16 shares *United States* bank stock, hypothecated for this amount, 18th Nov. 1819,	1,200 00
Compensation in ship *Chesapeake* as per agreement, see your letter of instructions, dated 18th Nov. 1819, and *as a proof of its being customary*, see 21 October, 1817, when Mr. *Nancarrow* went supercargo, $2000, and the 25th May, 1816, when Mr. *Stith* went supercargo, $3000, -	2,000 00	Interest on do. from said period, until 15th Oct. 1821,	137 44
Wages of Capt. *Pawson*, as per your account, -	750 00	Insurance in *Maryland & Patapsco* Offices, per your account, - - - - - - - - -	374 14
Dividend received on 16 shares *United States* bank stock, as per your account, - - - - -	56 00	Amount of copper and bullion (silver) shipped by *Edwards & Stewart*, for account of Captain *Pawson*, see their and your account, - - - -	4,694 56
Amount transferred by *Edwards & Stewart*, of *Coquimbo*, a balance due by them to Capt. *Pawson*; see your and their account, - - -	7,777 87	Balance in your hands on the 15th October, 1821, - - - -	4,352 97
Amount deducted out of seamen's wages, as per your account, - - -	70 59		
	$10,774 82		$10,774 82

To balance from opposite, - - - - - - - -	$4,352 97
To interest on ditto until paid,	

Errors and E. Excepted.

Hamilton Graham, Actg Adm'r.

Add the stock on the other side, for which there is no credit, - - - - -	$1,200 00
	4,352 97
His claim then is	$5,553 97
Interest to Jan. 26, 1825,	1,084 03
	$6,637 00
Besides which he claimed loss of privilege, - -	255 52
Drip Stones, - - - - - -	13 50
Duty saved at *Guasco*, -	14 56
Interest on $255 52-100,	49 72
	$6,970 30

Claim as set up in court, viz.	$5,552 97
Drip Stones and duty saved,	48 06
Loss of *Canton* privilege,	3,050 00
	$8,651 03
Interest from Oct. 15, 1821,	1,686 94
	$10,337 97

"The defendant then offered in evidence the following invoice of goods shipped at *London*, the 27th of April, 1820, and the account of the sales thereof, and the other accounts and papers hereinafter inserted, which were admitted by consent.

"1 bale, 8 cases British piece goods," &c. amounting to - - - - - -	£1062 10 8
Commission, brokerage, shipping, &c. 5 p. c.	53 2 7
	£1115 13 3"

"Account sales of sundries made by *Edwards & Stewart* to the government of *Chili*, for account of Captain *John C. Pawson*, of the ship *Chesapeake*,

1820	
Agt. 25. 45 coils cordage, wg. 113 qqs. 87 lbs. a 20 dlls. - - - - -	$2277 03½
1 day and night glass, - - -	30 00
	$2307 03½
Deduct commission 4 p. c. and spy glass, - -	122 02
Nett proceeds of cordage, - - - -	$2185 01½

Dr. *J. C. Pawson's* private acc. with *Edwards & Stewart*, Cr.

This account commenced on the 25th of August, 1820, and ended on the 18th of January, 1821.

The amount of the debits, including charges for 756½ dozen *Chinchilla* skins, and 10 marks, 6½ oz. silver, &c. - - - - - - -	$2,250 07¾
Amount of credits including nett *proceeds of* sales herewith sent, $8070 1¾, - - - -	10,028 06¾
Balance due, and this sum credited *John Donnell*, Esq. - - - - - -	$7,777 07

"Sales of sundry merchandize received by the ship *Chesapeake*, and sold by order and for account of Captain *John C. Pawson*."

The whole amount of sales, deducting charges, &c. $8070 13¼ dated *Coquimbo*, and signed by *Edwards & Stewart*.

John Donnell, Esq. of *Baltimore*, in account current with *Edwards & Stewart.*

Dr.		
1821.		
Jan. 19.	To bill of disbursements of the ship *Chesapeake*, at *Coquimbo*, per account herewith, - - -	$2,508 03¾
	Amount of invoice of 8076 qqs. 19 lbs. of copper, shipped from this port in the ship *Chesapeake*, Captain *Lane*, as per account herewith, - - - -	117,106 04
	Balance, - - - - -	32,655 05¼
		$152,270 05¼

Cr.		
1820.		
Aug. 28.	By our draught in favor of Capt. *Brintnal* on Captain *Pawson*, -	$28,309 03
Sep. 16.	Cash received from do.	6,192 06
21.	Letter of credit of Messrs. *Lynch, Hill & Co.* in favor of Capt. *Pawson*, - - - -	3,500 00
Oct. 25.	700 doubloons received at $17¼ - - - - -	12,075 00
	2000 do do do	34,500 00
	1300 do do do	22,425 00
	Received for 4 bbls. of salt beef, a 35 dlls.	140 00
	Received for 4 water casks a 15, - - - -	60 00
	Months' advance made to a sailor returned,	24 03
	Cash received of him,	60 00
Nov. 27.	2000 doubloons a $17¼,	34,500 00
	Draught of *Ed. M'Clure* favor *J. C. Pawson*,	2,000 00
1821.		
Jan. 18.	Cash received for 2 bbls. tar, a $10, - - - -	20 00
	Do do 30 ggs. vinegar, a 50 cts. - - -	15 00
	Discount on $6713,1 rrl. paid in the custom house in government paper, being this proportion allowed to be received in paper, the residue paid in cash, a 10 p. c. - - - -	671 02¼
	Balance of Capt. *Pawson's* acct. current,	7,777 07
		$152,270 05¼
	By balance, - - -	$ 32,655 05¼

E. & O. E. *Coquimbo*, Jan. 19, 1821. *Edwards & Stewart.*

John Donnell, Esq. of *Baltimore*, in account with *Edwards & Stewart.*

Dr.	
To amount of invoice of copper and gold shipped in *Guasco*,	$28,105 01½
To amount of invoice of copper and silver, shipped on account of the late Captain *Pawson*,	4,694 4½
To amount of bill for disbursement in *Guasco*, - - - - -	91 05¾
	$32,891 03½

Cr.	
By balance of account current at *Coquimbo*, - - - - - - -	$32,655 05½
By 10 per cent. discount, allowed on $1,777 paid in government paper on the invoice of $28,105, a 1½ rs. - - - - -	177 05½
By do do on that of the late Captain *Pawson*, - - -	14 04½
By one months advance charged twice to *Eugenio*, merchant,	30 00
By charge for drip stones not received, - - - - - - - - -	13 04
	$32,891 03½

E. E. *Guasco*, Jan. 22, 1821. *Edwards & Stewart.*

Disbursements of the *American* ship *Chesapeake*, in the port of *Coquimbo*, by order of Captain *Lane*, from the 16th February to 30th June, 1821, amounting, including commissions, to $1,654 02½. Dated at *Coquimbo* the 3d of July, 1821, and signed by *Edwards & Stewart.*

Captain *Lane*, ship *Chesapeake*, in account with *Edwards & Stewart.*

Dr.		Cr.	
To amount charges on 2876 bars of copper, shipped on board the ship *Esther*, - - - - - - -	$2,454 05¼	By 124 bars of copper, wg. 304 qqs. 24 lbs. a $14 4-100, sold to pay the expenses at the price of $12, and the duties, - - - - - -	$4,271 04
Do do on 300 bars shipped on board ship *Chesapeake*, - - -	315 02¼	An error in the calculation of commissions in the invoice of copper shipped at *Guasco*, - -	100 00
Amount of disbursements of ship *Chesapeake*, - - - - - - - -	1,655 02½	Cash recd. for 839 lbs. of bread a $6	50 02¾
		Balance, - - - - - - - - -	3 03¾
	$4,425 02½		$4,425 02½

"Amount of *charges* of 2100 bars of copper, discharged in this port, and 900 bars discharged in *Guasco*, from on board the *American* ship *Chesapeake*, Captain *T. A. Lane*, in order to ascertain the extent of injury, received on her passage from *Guasco* to *Baltimore*, of which bars of the same were reshipped by order of Captain *Lane*, on board the *American* ship *Esther*, Captain *F. G. Low*, bound for *Baltimore*, for account and risk of whom it may concern, and consigned to *John Donnell, Esq.* merchant, of *Baltimore*," amounting to $2454 05¼, dated at *Coquimbo*, and signed by *Edwards & Stewart* the 3d of July, 1821. This account included a commission on 2876 bars of copper, amounting to $1651 06.

"Account of *charges* of 300 bars of copper that were discharged from on board the *American* ship *Chesapeake*, in order to ascertain the extent of injury received on her passage from *Guasco* to *Baltimore*, and reshipped by order of Captain *T. A. Lane*, of said ship, for account and risk of whom it may concern, and consigned to *John Donnell, Esq.* merchant, *Baltimore*," amounting to $315 2¼, including commission on 300 bars of copper, amounting to $179 04¼. Dated and signed as above.

"Disbursements of the *American* ship *Chesapeake*, Captain *John C. Pawson*, at the port of *Coquimbo*, by *Edwards & Stewart*, amounting, including commission, to $2,508 03¾, dated the 19th of January, and signed by *Edwards & Stewart*.

An invoice of goods, &c. shipped by *Edwards & Stewart*, by order of Captain *Lane*, on board the *Esther*, whereof *F. G. Low* is master, bound to *Baltimore*, viz: 2876 bars of copper, weighing 5505 quintals, 98 pounds Spanish weight, being part of the original cargo of the ship *Chesapeake*, and shipped for account of whom it may concern, unto *John Donnell*, he paying freight, &c. Dated *Coquimbo*, 3d of July, 1821.

Also, the check of the defendant on the *Office of Discount and Deposit*, in favour of the owners of the ship *Esther*, for $14,453 20.

To dispense with a commission to take testimony the plaintiffs admitted, 1st. The transaction of cordage from *London* to *Coquimbo*, according to the account of sales of the cordage. 2. That the cordage was for the joint account of *Pawson* and *Goddard*. 3. That gold and silver bullion are prohibited articles of exportation at *Chili*. 4. The parties agreed that all letters and accounts of sales and accounts current, from *Edwards & Stewart*, may be read on both sides.

The defendant also offered in evidence, that the usual freight from *London* to *Coquimbo*, was fifty dollars per ton. The plaintiffs then offered in evidence, that it was the usage among ship owners and masters, not to charge freight where the ship was in ballast, for any articles shipped by the captain on his own account. The defendant offered in evidence, that there was no usage as above stated, and that the captain was liable for freight to his owner like any other person, if the owner chose to exact it.

1st. EXCEPTION. The defendant then prayed the opinion of the court to the jury, that upon the evidence above stated, the defendant is entitled to set off, in this case, the freight on the goods and merchandize, shipped by Captain *Pawson*, on his own account, from *London* to *Coquimbo;* which opinion the court [ARCHER, Ch. J. and WARD, A. J.] refused to give, but were of opinion, and so directed the jury, that the defendant is entitled to set off the said freight, unless the plaintiffs can shew by testimony, that there was a known and established usage that the captain, under the above circumstances, was not chargeable with freight, and that the said usage was so well known and established, that it must be supposed to have entered into the contemplation of the parties at the time they originally made the contract first herein before stated. The defendant excepted.

2. **Exception.** The defendant then prayed the court to instruct the jury, that according to the contract of the parties, as set forth in the correspondence exhibited in the *first* bill of exceptions, the voyage as originally projected, to wit, from *Baltimore* to *London*, thence to *Coquimbo*, thence to *Canton*, and thence home to *Baltimore*, having been altered by the direction of the defendant, and the consent of Captain *Pawson*, so as to strike out the trip from *Coquimbo* to *Canton*, and give the ship a destination direct from *Coquimbo* home to *Baltimore*, the privilege originally stipulated for Captain *Pawson* to bring home twenty-five tons from *Canton*, clear of freight, was voluntarily relinquished by him, and exchanged for the privilege of bringing home his funds in copper from *Coquimbo*, and that, consequently, the plaintiffs are not entitled to any compensation for the alleged loss of the privilege of bringing home the twenty-five tons from *Canton*. Which instruction the court refused to give, but gave the following opinion and direction to the jury:

The court are of opinion and so direct the jury, that the plaintiffs are entitled to recover an equivalent for the loss they may prove their intestate to have sustained, by being deprived of his privilege from *Canton* or *Batavia* to the *United States*, in consequence of the change made by the defendant in the destination of the vessel, unless the jury should be satisfied from the evidence, that the plaintiffs' intestate did, with a knowledge of his legal rights, waive the benefit of the privilege accorded to him at the commencement of the voyage, and did accept in lieu thereof a privilege from *Coquimbo* to *Baltimore*. The court further instruct the jury, that if they believe from the evidence that the plaintiffs' intestate shipped goods from *London* to *Chili*, on board the defendant's vessel, that the defendant is entitled to a credit for the freight thereof, unless the jury shall believe that there existed a definite general and well known usage, at the time of the commencement of the voyage, that freight, under the circumstance of this case, should not be charged by parties standing in the relation of the defendant to the plaintiffs' intestate. And further, unless the jury believe there was such a waiver and acceptance as is stated in the first part of this direction, on the part of the plaintiffs' intestate, that then the defendant is entitled to a reasonable freight for such articles as were shipped on account of, or which belonged to plaintiffs' intestate, from *Chili* to the *United States*. The defendant excepted.

3. Exception. The defendant further prayed the court to instruct the jury, that if they believe that the contract made between the plaintiffs' intestate and defendant, was an entire contract for $2000, for the faithful performance of the duties of supercargo by *Pawson*, and a strict conformity to the instructions he should receive, that then the violation of his duty as supercargo by a departure from his instructions in taking on freight, prohibited articles, thereby putting the ship and the owner's interest therein, in jeopardy, was such an infringement of the entire contract, as took away from the plaintiff any right to demand the fulfilment of the same on the part of the defendant. Which opinion and direction the court refused to give. The defendant excepted.

4. Exception. The defendant then prayed the court further to instruct the jury, that according to the contract of the parties as set forth in the correspondence exhibited in the *first* bill of exceptions, the compensation of $2000 stipulated to be paid to Captain *Pawson*, as supercargo, had relation to the original voyage from *Baltimore* to *London*, thence to *Coquimbo*, thence to *Canton*, and thence home to *Baltimore*; and that the voyage having been shortened by striking out the trip to *Canton*, and making the destination of the vessel direct from *Coquimbo* to *Baltimore*, and Captain *Pawson* having, moreover, died at *Coquimbo*, in the course of the voyage, before he had completed the investment of the defendant's funds, that compensation is subject to abatement in the discretion of the jury on two

grounds—*First*, for the alteration of the voyage, if the jury shall be of the opinion that the labour and responsibility of Captain *Pawson* were thereby lightened—*Second*, for that portion of the contemplated services of Captain *Pawson*, which were lost to the defendant by his death at *Coquimbo*. Which instruction the court refused to give, but were of opinion, and so directed the jury, that if they believed the evidence in the cause, the plaintiffs were entitled to recover of defendant a rateable proportion of the sum of $2060, which proportion the jury should ascertain by computing the time from the commencement of the voyage to Captain *Pawson's* death, and from his death until the duties of supercargo were completed by the signature of the bill of lading, for the homeward voyage, and that the jury may allow him as supercargo such portion of the said sum as they may deem him entitled to, for acting in said capacity, up to the time of his death, at *Coquimbo*, according to the rule above stated. The defendant excepted.

5. EXCEPTION. The defendant then prayed the court to instruct the jury, that, according to the contract of the parties as set forth in the correspondence exhibited in the *first* bill of exceptions, the compensation of $2000, stipulated to be paid to Captain *Pawson*, as supercargo, on the voyage originally projected, to wit, from *Baltimore* to *London*, thence to *Coquimbo*, thence to *Canton*, thence home to *Baltimore*, was one entire compensation to be paid for one entire service, on the return of Captain *Pawson* to *Baltimore*, and not subject to be apportioned by a part performance of the service, unless Captain *Pawson* had been prevented by the defendant from performing the residue thereof—that the voyage having been altered by the consent of the parties (as appears by said correspondence) by striking out that part of it which related to the trip to *Canton*, and directing the destination of the ship from *Coquimbo* to *Baltimore*, without saying any thing of the aforesaid compensation to Captain *Pawson*, as supercargo, that stipulation attached upon the new voyage, precisely in the same manner in which it had been attached to the original voyage, that is to say, that it was one entire compensation for one entire service, not subject

to be apportioned by a part performance of the service, and that consequently, the death of Captain *Pawson* at *Coquimbo*, in the progress of the voyage, and before the complete performance of the service, put an end to all claim on the part of the plaintiffs, to any part of the $2000. Which opinion and direction the court refused to give. The defendant excepted.

6. Exception. The defendant then prayed the court to instruct the jury, that in estimating the value of the privilege of twenty-five tons from *Canton* to *Baltimore*, which, according to the opinion expressed in the *first* bill of exceptions, the plaintiffs are entitled to claim in this action; if it was not relinquished and exchanged by Captain *Pawson*, by the privilege from *Coquimbo*, the jury should consider that privilege as having been subject to the contingency of the safe arrival of the ship at *Canton*, and the continuance of Captain *Pawson's* life, and that either the destruction of the ship or the death of Captain *Pawson* at *Coquimbo*, in the course of that voyage, would have put an end to all claim by his representatives on account of this privilege. Which instruction the court refused to give, and instructed the jury that these contingencies ought not to enter into their calculation. The defendant excepted.

7. Exception. And the defendant further prayed the court to direct the jury, that the plaintiffs are not entitled to recover the said sum of $2000, nor any part thereof, under the evidence given in this cause. Which opinion and direction the court refused to give. The defendant excepted.

8. Exception. The defendant also prayed the court to direct the jury, that if the jury believe that Captain *Pawson* had actually purchased before his death, a sufficient quantity of copper, which, with the other property, purchased by Captain *Pawson* for account of the defendant, and afterwards put on board, was sufficient to exhaust the funds of the defendant confided by him to *Pawson*, that then the plaintiffs are not entitled to recover the compensation of $2000, mentioned in the letters of instruction of the defendant, unless the defendant received on board his ship a sufficient quantity of copper to exhaust his

said funds. Which opinion and instruction the court refused to give. The defendant excepted.

9. Exception. The defendant further prayed the court to instruct the jury, that there is no evidence in the cause from which they can infer that Captain *Pawson* consented to the change of the original voyage from *Coquimbo* to *Canton*, and from *Canton* to the *United States*, and waived his privilege from *Canton* to the *United States*, through ignorance of his legal rights, the presumption of law being that, if he had full knowledge of the facts, he had full knowledge of his legal rights growing out of those facts. Which opinion and instruction the court refused to give. The defendant excepted.

10. Exception. In addition to the evidence stated in the preceding bills of exceptions, the plaintiffs offered in evidence, that the gold which was seized at *Guasco*, was purchased after the death of *Pawson*, and after all the copper which the said ship would bear, was actually purchased and loaded on board the said ship, and that the same was purchased with the very doubloons brought by *Pawson* for, and on account of *Donnell*, from *England*, and which remained in possession of *Edwards* & *Stewart*, at the time of *Pawson's* death; and that the said gold was actually purchased by, and under the advice of *Thomas A. Lane*, acting as the captain—which said *Lane* was the mate of the ship, and succeeded to the command on the death of *Pawson*—that in the said proceeding *Lane* had no other authority from *Donnell* to act as his agent than what was derived from his succeeding *Pawson* as captain of the ship, and was acting under the instructions of *Donnell* to *Pawson* beforementioned. The plaintiffs then prayed the opinion of the court to the jury, that if the jury find from the evidence, that the gold which was seized and lost at *Guasco*, after the death of *Pawson*, was purchased by *Edwards & Stewart* after *Pawson's* death, with the separate funds of *Donnell*, and on his account, and shipped accordingly, without any power or authority from *Pawson* to do so, that then the defendant is not entitled to set off the value or cost of the gold against the claim of the plaintiffs in this suit.

Which opinion the court refused to give. The plaintiffs excepted.

11. EXCEPTION. The defendant further prayed the court to instruct the jury, that, according to the orders of the defendant, assented to by Captain *Pawson*, as set forth in the correspondence exhibited in the *first* bill of exceptions, it was the duty of the said *Pawson*, as the supercargo and agent of the defendant, to invest all of the defendant's funds in copper at *Chili*, if copper could be had, and to bring the same home, and deliver it to the defendant in *Baltimore;* and if, in these circumstances, *Pawson* holding both the defendant's funds, and his own, after having purchased and put on board the ship *Chesapeake*, copper equal to the amount of the defendant's funds, thought proper, for any reason, to make an investment in gold or silver, and did, during his life, make such investment; or, if his agents, *Edwards & Stewart*, succeeding to the possession of those joint funds, did, after copper had been purchased and put on board equal to the amount of defendant's funds, make any such investment in gold or silver, and if such gold and silver was afterwards seized by the government of *Chili*, and confiscated, as having been attempted to be exported, contrary to the laws of the country, that the loss must be borne by *Pawson* and his representatives, and cannot be thrown on the defendant. Which opinion and instruction the court gave. The plaintiffs excepted.

12. EXCEPTION. The defendant further prayed the court to instruct the jury, that if, upon the whole evidence in the case, they shall be of opinion, that copper was brought home, equal to the whole amount of the funds of the defendant, and equal to *Pawson's* privilege in copper, (as he was willing to accept it) that the plaintiffs are not entitled to recover of the defendant, the amount of any gold or silver which *Pawson* or his agents, *Edwards & Stewart*, may have put on board the *Chesapeake*, of their own accord, and without the knowledge, consent, or orders of the defendant, and which may have been afterwards seized by the government of *Chili*, and confiscated, as having been attempted to be exported, contrary to the laws of the land—and that the defendant's having received from Captain *Lane*, the

successor of Captain *Pawson*, in the command of the *Chesapeake*, the letters and invoices sent to him by *Edwards & Stewart*, is not, under the circumstances of the case, such a ratification of the act of purchasing and putting on board such gold and silver, as to throw the loss of it upon the defendant, and to authorize the plaintiffs to recover it from him in this action. Which opinion and instruction the court gave. The plaintiffs excepted.

Verdict and Judgment for the Plaintiffs for the sum of $5510 43. From which judgment both parties, the plaintiffs and defendant, appealed to this Court.

The cause on both appeals was argued before BUCHANAN, Ch. J., and STEPHEN and DORSEY, J.

Williams, (District Attorney of U. S.) for *Pawson's* administrators, the appellants in the first appeal, contended in argument on the three bills of exceptions taken on the part of the plaintiffs below, viz: the 10th, 11th, and 12th bills of exceptions.

1. That the gold, which was seized at *Guasco*, and there condemned, having been purchased by *Edwards & Stewart*, after the death of *Pawson*, without his authority, but with the advice of his successor, Captain *Lane*, and with the money of the defendant, ought not to be charged to *Pawson*, nor the cost thereof deducted out of his funds.

2. That *Pawson* ought not to bear the loss of the gold, purchased, seized and condemned as aforesaid. 1st. Because he was not bound to invest all the defendant's money in copper, to the exclusion of his own funds. 2d. Because he did not purchase any gold in his lifetime;—and, 3d. Because *Edwards & Stewart* were not his agents, after his death, so far as regarded the defendant's funds, but were in that respect, the defendant's agents.

3. That *Edwards & Stewart*, being, after *Pawson's* death, only his agents, or the agents of his representatives, for the funds of *Pawson* in their hands, and being the agents of the defendant, for the funds of his in their hands, and *Pawson* having a co-equal right with the defendant to have his funds invested in copper; and the said agents having *actually* invested a part of the defendant's funds in gold, and none of *Pawson's* in that arti-

cle, the loss of the gold is the defendant's, and not *Pawson's* representatives.

On the *second* point he referred to 2 *Liv. on Agency*, 298. 1 *Liv. on Agency*, 261 to 278. *Taylor vs. Plummer*, 3 *Maule and Selw.* 562. 2 *Liv. on Agency*, 281.

C. C. Harper for *Donnell*, the appellee in the *first*, and the appellant in the *second* appeal, stated that for the appellant in the *second* appeal, it would be contended,

1. That no usage can, in such a case, be permitted to be engrafted upon, or to control a written and express contract so plainly and unambiguously set out. This point arises under the *first*, and a part of the *second* bills of exceptions.

2. That the privilege from *Canton* depended entirely upon the voyage to *Canton*, which was within the control of the defendant below, as owner of the ship; that this privilege was expressly waived by *Pawson* for an equivalent, with knowledge of his legal rights; and that, with knowledge of the facts, ignorance of his legal rights was no excuse. This point embraces a part of the *second* bill of exceptions.

3. That *Pawson's* acceptance or non-acceptance of the new voyage, and substituted privilege, was a question of law, and that the court ought to have construed the writings under which the question of acceptance arose, and not have left it to the jury. This point embraces also a part of the *second* bill of exceptions.

4. That the record affords no evidence of any ignorance of his legal rights, and that the court ought so to have directed the jury, as prayed in the ninth bill of exceptions, and erred in refusing such direction. This point embraces the ninth bill of exceptions.

5. That the $2000 agreed to be paid as compensation to *Pawson*, depended on the performance of the entire voyage, and on his return to *Baltimore*, which were *conditions precedent.* This point embraces the *third*, *fifth*, and *seventh* bills of exceptions.

6. That if the whole $2000 cannot be recovered, there cannot be an apportionment, and no part of it can be recovered. This point embraces the same bills of exceptions in part.

7. That *Pawson*, by departing from the instructions of the defendant, (the owner of the ship he commanded, and in whose employ he was) and by his other misconduct, as detailed in the record, lost his right to demand the compensation of $2000, or any part thereof. This point embraces the same bills of exceptions in part.

8. That the court below having pronounced an opinion that there could be an apportionment of the compensation of $2000, they erred in directing the jury not to allow any abatement by reason of the shortening of the voyage, or the death of *Pawson*, and they also erred in fixing the "date of the signature of the bill of lading for the homeward voyage," as the period at which his duties as supercargo, were completed. This point embraces the *fourth* bill of exceptions.

9. That if the privilege from *Canton* did not depend entirely on the voyage to *Canton* taking place, and the defendant was liable to *Pawson* for the loss of the original voyage and privilege surrendered by him "under a mistake of his legal rights," then the jury, in estimating the value of the privilege so surrendered, ought to have taken into their calculation the possible death of *Pawson*, or the possible loss of the ship before she reached *Canton*, and the court below erred in refusing such direction to the jury as prayed by the defendant in the *sixth* bill of exceptions.

10. That if *Pawson* had actually purchased, before his death, an amount of copper, which, with the other property purchased for the defendant, and put on board, was sufficient to exhaust the funds of the defendant, confided to *Pawson* by him, that then the plaintiffs below were not entitled to recover the $2000, unless the defendant received on board his ship, a sufficient quantity of copper to exhaust his funds, and the court below erred in not so directing the jury, as prayed for by the defendant below, as stated in the *eighth* bill of exceptions. Under this point, the defendant (now appellant) contends, that *Pawson*

was special agent for the purchase of copper; that if he was general agent, he violated his duty by not using a sound discretion; that *Edwards & Stewart* were his agents; and that the gold and silver belonged to him.

11. The appellant will also contend, under the *eighth* bill of exceptions. 1st. That independent of the hypothetical assumption in the prayer upon which this exception is founded, the fact that a surplus of copper (over and above all the defendant's funds, and over and above the 147 quintals delivered to *Pawson*) remained in the ship, is proved by the evidence in the record. 2d. That the ship was sent, and *Pawson* employed for a special purpose; that she was not a general ship, and therefore *Pawson* could not take in goods for other persons, or interfere with the owner's arrangements, and thereby throw a loss upon the owner. 3d. That if he could so use the ship as to bind his owner to third persons, the owner might set off the compensation of $2000 against such loss.

On the *second* point he cited 1 *Liv. on Agency*, 150, 151. *Doct. and Stud.* ch. 26, page, 79; ch. 46, page, 253. *Lowry vs. Bourdieu*, *Dougl.* 471, (455.) *Lammott vs. Bowly*, 6 *Harr. & Johns.* 520.

On the *fifth point*, *Portage vs. Cole*, 1 *Saund.* 320 (*note* 4.) *Furnival vs. Crew*, 9 *Mod.* 455, 459.

On the *sixth* point, *Cutter vs. Powell*, 6 *T. R.* 320. *Cook vs. Jennings*, 7 *T. R.* 381.

On the *tenth* point, *East India Company vs. Hensley*, 1 *Esp. Rep.* 111. *Fenn vs. Harrison*, 3 *T. R.* 757. *Gibson vs. Colt*, 7 *Johns. Rep.* 393. *Prince vs. Clark*, 8 *Serg. & Low*, 54. *Esp. Evid.* 64. 1 *Com. on Cont.* 237. 2 *Liv. on Agency*, 298.

R. B. Magruder on the same side. On the *first* point he cited *Poth. on Mar. Cont.* 13, 14, 32, 135. *Abbott on Shipping*, 137, (119) 557. 3 *Stark. Evid.* 998, 1036.

On the *third* point, *Macbeath vs. Haldimand*, 1 *T. R.* 180, 182 *Ferris vs. Walsh*, 5 *Harr. & Johns.* 308.

On the *fourth* point, *Key's Exr. vs. Parnham*, 6 *Harr. & Johns.* 418. *Davis vs. Davis, et al.* 7, *Harr. & Johns.* 36.

On the *seventh* point, *Abbott* 183. *Montgomery vs. Wharton*, 2 *Peters' Adm. Rep.* 401. 1 *Com. on Cont.* 221, 222, 225, 230, 235. *Robinson vs. Hindman*, 3 *Esp. Rep.* 235.

On the *eighth* point, *Abbott* 482.

On the *ninth* point, *Pothier* 135.

On the *eleventh* point, *Abbott* 119, 1 *Com. on Cont.* 221, 222. *Campbell vs. Thompson*, 2 *Serg. & Low*, 481, (1 *Stark. Rep.* 490.) *Locke vs. Smith*, 10 *Johns. Rep.* 250. The act of 1785, ch. 46 and 47. *Clarke vs. Magruder*, 2 *Harr. & Johns.* 77. *McFadon vs. Baltimore Insurance Company*, 4 *Harr. & Johns.* 45.

Williams, (District Attorney of the U. S.) in reply to the argument of the counsel of *Donnell*, on the bills of exceptions taken by him, and which constitute the subject of the *second* appeal, on the *first* bill of exceptions, he cited 3 *Stark. Evid.* 1038. 2 *Stark. Evid.* 453, 454, 447, 452. *Birch vs. Depeyster*, 2 *Serg. & Low.* 359. (1 *Stark. Rep.* 210.) *Senior vs. Armitage*, 3 *Serg. & Low*, 71. *Cutter vs. Powell*, 6 *T. R.* 320. *Zagary vs. Furnell*, 2 *Camb.* 240. *Renner vs. Bank of Columbia*, 9 *Wheat.* 582. *Jackson vs. The Union Bank of Maryland*, 6 *Harr. & Johnson*, 146. *Bank of Columbia vs. Magruder's Admx. Ibid.* 172, 180. *Phill. on Ins.* 18. *Park*, 589, 630. *Marsh.* 226, 259, 270, 365, 375, 707. *Trott vs. Wood*, 1. *Gall. Rep.* 444. *Winter vs. Brockwell*, 8 *East.* 308.

On the *eighth* bill of exceptions, *Peake's Evid.* (*Norris's Ed.*) 416. *Winchester vs. Hackley*, 2 *Cranch* 342. 2 *Stark. Evid*, 642, 643. *Farmsworth vs. Garrard*, 1 *Campb.* 38.

On the *third* bill of exceptions, 1 *vol. Laws of U. S.* 272.

On the *fourth* bill of exceptions, *Etting vs. Bank of United States*, 11 Wheat. 75. 1 *Liv. on Agency*, 69 to 180. 2 *Liv. on Agency* 214, 215. *Kendrick vs. Delafield*, 2 *Cain's Rep.* 67, 72. *The United Insurance Company vs. Scott and Seaman*, 1 *Johns. Rep.* 111, 115. *Abbott* 270. *Thorne vs. White*, 1 *Peters. Adm. Rep.* 176 (*note.*) *Rice vs. The Polly and Kitty*, 2 *Peters Adm. Rep.* 420.

On the *fifth* bill of exceptions, *Cutter vs. Powell*, 6 *T. R.* 320. *Abbott*, 427. *Hart vs. The ship Littlejohn*, 1 *Peters Adm. Rep.* 115, 118, 119, 121. *Pothier* 116, 117, 118. *Pordage vs. Cole*, 1 *Saund.* 320 (*note* 4.) *Campbell vs. Jones*, 6 *T. R.* 570. 2 *Stark. Evid.* 642. 1 *Pow. on Cont.* 267.

On the *second* bill of exceptions, *Laidlaw vs. Organ*, 2 *Wheat.* 178, 183, 195. *Etting vs. Bank of United States*, 11 Wheat. 75. 1 *Liv. on Ag.* 71. *M'Intyre vs. Bowne*, 1 *Johns. Rep.* 238, 259. *Lammott vs. Bowly*, 6 *Harr. & Johns.* 522, 524.

On the *ninth* bill of exceptions, *Lammott vs. Bowly*, 6 *Harr. & Johns.* 522, 524, 1 *Stark. Evid.* 399. *Etting vs. Bank of United States*, 11 Wheat. 76.

On the *sixth* bill of exceptions, *Etting vs. Bank of United States*, 11 *Wheat.* 75, *Abbott*, 489, 434. *Val. Com. tit.* 4 *art.* 3, 2 *Bro. C. & A. L.* 533. *Pothier* 120, 126. *Nap. Code, art.* 250. *Morrison vs. Galloway*, 2 *Harr. & Johns.* 461 *to* 468. *Sigard vs. Roberts*, 3 *Esp. Rep.* 71. *Knight vs. Crockford*, 1 *Esp. Rep.* 192, 193. *Campbell vs. Jones*, 6 *T. R.* 570. *Hoyt vs. Wildfire*, 3 *Johns. Rep.* 518. *Sullivan vs. Morgan*, 11 *Johns. Rep.* 66.

The causes were then postponed, and by agreement, written arguments of the counsel were to be submitted to the court; and the following were accordingly submitted.

Taney, (Attorney General) for *Pawson's* administrators. In the case now under discussion, (the one in which *Donnell* is appellant,) it will be found that there are three subjects in controversy between the parties.

1. Is *Donnell* entitled to charge freight on the goods of *Pawson*, shipped "on his own account" from *London* to *Coquimbo?*

2. Are *Pawson's* administrators entitled to recover any part of the $2000, mentioned in *Donnell's* letter of November 18, 1819? And if they are entitled to recover a part, what proportion are they entitled to recover, and by what rule is that proportion to be ascertained?

3. Are the administrators of *Pawson* entitled to recover compensation for the privilege of twenty-five tons, from *Canton* to *Baltimore*, stipulated in *Donnell's* letter of November 18, 1819, and of which *Pawson* was deprived by the act of *Donnell*, in changing the voyage originally contemplated?

The defendant below has brought up *nine* exceptions, and each of them will be found to relate to one of the items abovementioned, and to involve some of the questions there stated. Instead, therefore, of taking up the exceptions, in the order in which they are set forth in the record, they will be classed and considered in this discussion, according to the above arrangement.

First point.—Is *Donnell* entitled to charge freight on the goods and merchandize shipped by *Pawson*, on his *own* account, from *London* to *Coquimbo.*

This question is presented by the prayer of the defendant, and the opinion of the court in the 1*st exception.* The same principle is again decided in the 2*d exception.*

The whole course and objects of the voyage contemplated, when the vessel sailed from *Baltimore*, are detailed in the letter of *Donnell*, of November 18, 1819, and the alterations afterward smade, will be found in his letter of December 26, 1819.

According to both letters, the ship was to proceed in ballast from *London* to *Chili.* The amount of goods shipped by *Pawson*, and his motives for this shipment, will be found in his letter. "In consequence," says *Pawson*, "of the scarcity of doubloons, I have thought it adviseable to invest my own funds in merchandize, in hope that it may do as well, and because I would not interfere in any manner with your business." See also his letter of April 27, 1826.

It is admitted, that the contract between *Donnell* and *Pawson* was in writing, but the whole of the written contract is not before the court. It was contained in part in the shipping articles, and in part in the letters of *Donnell* before referred to. In the admissions, the monthly pay of *Pawson* as stipulated in the shipping articles, is stated:—but what else is contained in that paper does not appear. It belonged to the ship, and on her return to *Baltimore*, must, with the other papers of the vessel, have fallen into the hands of *Donnell.* It is not suggested in the record, that this document has been lost or mislaid. Why it was kept back, is not explained, nor is it necessary now to inquire. But while *Donnell* withholds the paper, and gives no proof of its contents, he cannot be allowed to say that the usage relied on by the plaintiffs, is contrary to, or inconsistent with other provisions contained in the agreement. So far as the contents of the writings are before the court, they are silent as to the privilege claimed under the usage, and certainly contain no stipulation in opposition to it, or inconsistent with it. They do not say that Captain *Pawson* may, or that he may not ship goods on his own account from *London* to *Coquimbo.* And if goods should be shipped by him, they do not say whether he shall, or shall not pay freight. The contract, as we are allowed to see it, is silent on this subject.

The writing being silent in relation to the right in question, the first enquiry is, can the known and established usage of trade, annex to this contract as incident to it, a right in the captain to ship the goods herein before mentioned, free from freight? This inquiry involves two questions. *First*, can the known and established usage of trade give to either of these parties a right, not stipulated in the writing? *Secondly*, if usage may give such a right, is the usage in question a reasonable usage, or is it unreasonable, and therefore illegal and void?

Upon the first of these questions the appellees insist, *that in a commercial contract, custom and usage may superadd a right to either of the parties, concerning which the written contract between them is silent.*

This principal of law is a familiar one, and the authorities to maintain it numerous and undisputed. The court are referred to a few of them, where the principle is clearly and distinctly set forth. 3 *Stark. Ev.* 1038. *Bank of Columbia vs. Magruder,* 6 *Harr. & Johns.* 180. *Renner vs. Bank of Columbia,* 9 *Wheat.* 581. The rule, and the reason of the rule, is so well stated in *Stark. Ev.* 1038, that the passage is transcribed for the court—"In many instances extrinsic evidence of custom and usage is admissible for the purpose of annexing incidents to the terms of a written instrument concerning which the instrument is silent. The principle upon which such evidence is admissible, seems to be a reasonable presumption that the parties did not express the whole of their intention, but meant to be guided by custom as to such particulars as are generally known to be annexed by custom and usage to similar dealings. It is evident that in commercial affairs, and all the other usual and common transactions of life, it would be attended with great inconvenience that the well-known ordinary practice and usage on the subject should not be tacitly annexed, by virtue of such a presumption, to the terms of a contract, and that the parties should either be deprived of the certainty and advantage, to be derived from the known course of dealing, or be placed under the necessity of laboriously specifying in their contracts by what particular usages they meant to be bound."

Indeed even in the case of a sealed instrument, in which parol evidence is much more reluctantly admitted, than in the cases of commercial contracts, usage may be given in evidence to superadd a right not granted by the terms of the deed itself, and about which the deed is silent. *Wiglesworth vs. Dallison, Doug.* 196, 197. This case was that of a lease by deed; and usage was received in evidence, and permitted to engraft on it an additional right to the tenant, not mentioned in the deed. It was a right which by the force of usage grew out of the relation of landlord and tenant, and was a consequence of that relation which the deed had created. So here usage may engraft on the contract an additional right to the captain not mentioned in the written instruments, but which by the force of usage grows out of the relation of owner and captain, and is a consequence of that relation. In the language in 3 *Stark. Ev.* 1038, before quoted, it is annexed as an incident to the terms of the contract.

The same principle is recognized in *Senior vs. Armitage*, 3 *Serg. & Low*, 71, 72, where Baron *Thompson* says, "that as to the special agreement in order to control the custom, it must be of such a nature, that it operated upon and prevented *in* *express terms* the custom from attaching." But it is said on behalf of the appellant, (and much stress seems to be laid on the circumstance,) that the written contract in this case is "express," and is "plainly and unambiguously" set out. And it is insisted, that evidence of usage is admissible in those cases only, where the written contract is ambiguous and doubtful in its terms. It would be a sufficient answer to this argument to say, that it cannot be predicated of this contract, that it is plainly and unambiguously set out in the writing. It has been already remarked, that the whole written contract is not before the court; that the shipping articles, a very material, and in this point, the most material part of the contract are not produced. They must be presumed to be in the possession of *Donnell*, and surely while he withholds the writing itself, he can hardly be permitted to rely on the clearness and perspicuity of its language, in order to bar the claim of the plaintiffs. It is suggested indeed in the argument, that the shipping articles were in the usual printed form, and *Abb. on Ship.* 557, has been referred to by the counsel for the appellant, to prove that the language of the usual printed form of shipping articles is express, plain and unambiguous. It need only be answered, that there is no proof to support the suggestion. The shipping articles may have been in the usual printed form; but there is no proof of it. No argument, therefore, can be founded on the assumption of that fact. But let us waive this objection to the argument of the appellants and concede, *argumenti gratia*, that the shipping articles were in the usual printed form. The language then is plain and unambiguous: the instrument is silent as to the privilege in question. More than this, the appellant can hardly demand in behalf of the written contract. It is denied that the power of usage to annex a new incident to a contract, and to give a right not mentioned in the contract to one of the parties, is in any degree dependent on the perspicuity, or on the ambiguity of the language used in the writing. It depends on the silence of the written contract, in relation to the incidental right claimed. The writing may be express, plain and unambiguous, in all the stipulations contained in it, and yet an additional right may be superadded by the force of usage, concerning which the contract is silent.

In the case of *Wigglesworth vs. Dallison*, in *Doug.* 196, 197, the deed was plain and unambiguous in all of its provisions, yet usage superadded an additional right to the tenant, beyond those granted by the deed. And the same principle is also clearly set forth in 3 *Stark. Ev.* 1038; and 3 *Serg. & Lowb.* 71, 72, before referred to, and made to depend *on the silence of the writing*, and not upon the perspicuity of the language, and the plainness of the stipulations contained in the deed. What can be more plain than an ordinary promissory note? Yet even local usages, brought home to the knowledge of the parties, may superadd to it four or five days of grace. It follows, therefore, from the authorities above mentioned, that inasmuch as the written contract is silent as to the privilege in question, it may be superadded by usage. The opinion of the court hypothetically assumes, that the usage was established by proof, and leaves it to the jury to say, whether or not it was so established by testimony.

It is not understood that the appellant objects to the opinion upon the ground that the court left it to the jury to find from the testimony, whether there was such a known and established usage as the appellees alleged. There was evidence for and against this usage; and in this state of the case, it is not contended by the appellant, that the existence of the usage was a question for the court, and not for the jury. If such an argument should be offered, the following authorities conclusively shew, that it was a fact to be tried by the jury, and not by the court. 2 *Stark. Ev.* 452. *Bank of Columbia vs. Magruder*, 6 *Harr. & Johns.* 180. Many others might be cited, but it is unnecessary to multiply cases upon a point not to be controverted. In the preceding discussion, the power of custom and usage is limited to cases where the written contract is silent, as to the right which the force of usage is invoked to sustain. But it has been extended much further in commercial contracts. There it is called in to aid in the construction of written instruments. *Cutter vs. Powell*, 6 *T. R.* 320. *Abb. on Shipp.* 213. (*note.*)

In the first of these two cases the Judges declare, that if a usage could be proved, they would expound the contract according to the usage, although it appears that such an exposition would have given to the contract a different meaning from that which, in their judgment, the writing imported. In other words, the usage would have controlled, the language of the written contract. In the case in *Abbot* above referred to, the usage was in opposition to the express words of the written contract, and yet the usage prevailed. The last mentioned case is indeed questioned by *Starkie* in the note, 3 vol. 1038, and perhaps it goes farther than any other decision on the subject. Yet, the judgment of Lord *Kenyon* on such a point, sanctioned as it would seem to be by Chief Justice *Abbot*, is entitled to high respect. We are not called upon to define the exact limits of the power of usage on commercial instruments. It is sufficient for us that the contract in this case is silent, as to the privilege or right claimed by the appellees; and if there were no other cases on this subject, but those in relation to bills of exchange and promissory notes, they would be abundantly sufficient to maintain the position for which we are contending. The words of these instruments are plain and unambiguous. Yet common usage constantly annexes to them the incident of the three days of grace. Three days of grace are the right of the debtor, and this right is superadded by the force of usage to the words of the instrument. Indeed, so omnipotent is the power of usage on commercial instruments, that although three days of grace, and no more are annexed by law as an incident to every instrument of this description, yet a mere local usage, when brought home to the knowledge of the parties, is sufficiently powerful, not only to superadd a right, but to vary it from the right which the law annexes. *Renner vs. Bank of Columbia*, 9 *Wheat.* 581. *Bank of Columbia vs. Magruder*, 6 *Harr. & Johns.* 180.

It may be therefore concluded, that, inasmuch as the contract is silent in relation to the privilege in question, evidence was

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admissible, to show that by the usage of trade Captain *Pawson* had a right to ship his goods free from freight. And if the usage was established by proof, it was a part of the contract and as binding on the parties, as if it had been introduced into the writing. In the language of the court, in *Bank of Columbia vs. Magruder*, 6 *Harr. & Johns.* 180, it enters into the contract, and becomes a constituent part of it.

Whether the usage was proved to the satisfaction of the jury, does not appear; nor is it material in this part of the controversy. The opinion of the court is founded on the hypothesis, that the jury should find from the testimony, that the usage was a known and established one, and that "it was so well known and established, that it must be suppposed to have entered into the contemplation of the parties at the time they originally made the contract." And if we have succeeded in establishing the rule of law before stated, then the opinion of the County Court is free from error, and ought to be affirmed, unless the usage in question is unreasonable, and therefore illegal and void. This brings us to the second question before mentioned.

2. Is the usage alleged by the appellees a reasonable usage, or is it unreasonable, and therefore illegal and void?

This point assumes, that the custom is proved to be a known and established one. The appellant contends, that although it be proved to the satisfaction of the jury, that the captain under the circumstances stated in the record, was not chargeable with freight according to the usage of trade:—And, although this usage of trade "was so well known and established, that it must be supposed to have entered into the contemplation of the parties, at the time they originally made the contract." Yet the usage so known and established, and so proved is unreasonable, and therefore illegal and void. This objection does not question the power of usage to give additional rights to the captain, not mentioned in the contract, it merely denies its power to give the particular privilege claimed. The objection applies to the nature and character of the usage, which is pronounced to be unreasonable, and on that account alone illegal and void.

It is difficult to imagine how a usage proved to be as well known and established, as the opinion of the court requires, could be unreasonable. Men are not apt to enter voluntarily and continually into contracts, contemplating upon every occasion an incident to the contract, which will subject them to unreasonable imposition. The opinion of the court requires, that the usage shall be so well known, that the appellant must be presumed to have looked to it when he bargained. Unless it was proved to this extent, the jury could not regard it, and were indeed forbidden to regard it.

The usage in question then could not have been proved, unless there had been a general concurrence and consent among the ship owners of *Baltimore*, for a length of time, sufficient to make it an established custom. It can scarcely be credited, that any class of men, would so long unite together in building up a system of dealing, unreasonable and unjust to themselves. And no class of men are less likely to commit such a folly, than the merchants. The mere fact, therefore, that it had become a known and established usage, is powerful evidence, that it must have been found by experience to be convenient and useful to both parties. Yet it is not necessary for us to prove the usage *reasonable;* the appellant must prove it to be *unreasonable.*

"A custom may be good although the particular reason of it cannot be assigned, for it sufficeth if no good legal reason can be assigned against it."—2 *Stark. Ev.* 447, and the authorities there cited.

But is there any thing unreasonable in the usage alleged? Can any good reason be assigned against it? The counsel for the appellant have indeed urged, that if the usage in question were established, a captain might load the ship on his own account, contrary to the owner's wishes—that he might take goods for others for his own profit, or to the injury of the owner —that he might take contraband articles, and thereby subject the ship to seizure—that he might fill the ship with passengers, and that those passengers might, by being belligerent in regard to some other nation, subject the owner to the loss of his ship, or might in some other way do him irreparable injury.

It is an easy matter to fancy a usage that would be full of evil, and then point out the evils which would spring from it. It will be far more difficult, however, to find them in the custom sanctioned by the County Court. It authorizes none of the acts above mentioned, and permits no injury to the owner in any shape. The usage in question is confined in express terms to the goods shipped by Captain *Pawson on his own account.* It does not extend to any other goods, and does not embrace the goods shipped by *Goddard*, or by any other person but the captain himself. It does not authorize him to take goods for another, either on freight, or free from freight. The court have not decided that any usage would deprive *Donnell* of the right to charge freight on the goods shipped by *Goddard.*

The court have not said that any usage would justify him in taking one or more passengers, either for his own profit or the profit of his owner. It is not meant to question the validity of a usage, to take a reasonable number of passengers who would not encumber the ship: but we desire to shew that no question upon that subject is involved in the opinion now under discussion. The usage, of which the court speaks, relates to the goods shipped by Captain *Pawson* on his own account; and not to the passenger from *London* to *Chili*, nor to the goods of *Goddard.*

The usage in relation to the captain's goods is also confined to the circumstances of the case before the court. There must have been, says the court, a known and established usage that the captain "*under the above circumstances, was not chargeable with freight.*" They do not speak of a usage extending further, or giving a right under any other circumstances, or to any other extent.

And what were the "*above circumstances*" to which the court limited their opinion? The ship was to go in ballast—the space occupied by the goods would have been vacant—the amount shipped was within the reasonable compass of his private and separate trade—it interfered with none of the owner's plans—

did not delay the ship—did not impede her voyage, or in any respect do injury to the owner, or put to hazard his property, or interfere with his plans of commerce—and the captain was induced to take these bulky articles in order the better to promote the views and the interest of the owner, and did thereby promote them. His original design was, it would seem, to take doubloons, upon which it will hardly be contended that freight would have been chargeable; he changed his intention, because he would not go into the market to compete with his owner, or take from the quantity the owner desired to procure. Is there any thing unreasonable in a usage that, *under such circumstances*, the captain is not chargeable with freight? It would rather seem that he must be a most unreasonable owner who would demand it. It surely does not work injustice.

The counsel for the appellant have cited *Pothier on Mer. Cont.* 14, 32 and 135, to prove that the owner is entitled to the use of the whole ship, and that, by an express article of the *French* commercial code, the captain can take nothing without paying freight, except what he may put in his chest. The authority cited is certainly entitled to very high respect on all questions of commercial law. The right of the owner to dispose of his vessel as he pleases is not disputed on our part; and it depends upon his will whether the goods may or may not be taken on board, and whether freight shall or shall not be charged. And it is because he has this absolute dominion over the freight that he may grant to the captain, or any one else, the right to take goods free from freight. If by express written contract he had given the privilege in question to the captain, nobody would doubt the validity of the grant; and if by the force of usage, the privilege is an incident to the contract, then such usage enters into the essence of the contract, and becomes a constituent part of it. It is as obligatory upon the parties as if it had been set forth in the writing. The privilege then is derived from the contract of the owner himself. In other words, it is granted by him. It is not, therefore, inconsistent with his rights, but is created by the exercise of his rights. It cannot be illegal and void on that account, for the owner may, by his contract, lawfully grant it. The usage therefore is not inconsistent with the right of property in the owner.

Neither is it unreasonable and void, by reason of its being against law. If we had a positive legislative enactment like the *French* ordinance in *Poth.* 135, relied on by the appellant, then any usage in opposition to the statute would be illegal and void. But we have no statute against it; nor have we any judicial decision against it; nor is it inconsistent with any principle of law. *Pothier's* work is very high evidence of commercial usages, because most of the principles, contained in the ordinances, have been adopted as usages of trade by the commercial world. Still it is nothing but evidence, and not conclusive evidence. All of the ordinances have not been adopted, and they are binding in so far only as usage has made them so: and where they do bind, it is by the force of usage alone. If, therefore, the custom has been otherwise, and is proved to have been otherwise, the one proved must govern. This court has decided that even a usage, acknowledged and settled by our own judicial decisions to be the law of trade, may be altered by a mere local custom, when brought home to the knowledge of the parties. Besides, what is the usage in one place, is not necessarily the usage in another; and what is the usage in a trade to one place, is very often not the usage in a voyage to another. The usage depends upon the place, and the voyage, and the trade in which the vessel is engaged. And the usage is itself the law of the trade. We know very well that usages often change; and what is the law of trade at one time, is not always the law at another. The power that makes the law repeals it. The new usage, when it has once become the known and established one, abrogates the old.

If we are right in the positions endeavoured to be maintained, then the usage in question is not contrary to the principles of justice, is not inconsistent with the owner's right of property, and is not contrary to any positive rule of law. We cannot, therefore, perceive how such a usage can be deemed unreasonable, and therefore illegal and void.

It may be concluded then, 1st, that a usage which is not unreasonable, may superadd a right not expressed in the contract—and 2dly, that the one in controversy is not unreasonable. And if these propositions have been established, it follows that when the contract was made between the parties, the right to ship the merchandize in question, free from freight, vested in *Pawson* by virtue of the contract, and consequently *Donnell* had no right to the set off which he claimed.

But in order to maintain the opinion of the court, it is not even necessary to insist that the right under it was a positive and absolute one, vesting in *Pawson* at the time the contract was made. We might concede that a usage to that extent would be unreasonable. We certainly make no such concession, because we are not aware that any principle of commercial law requires us to do so. But, waiving the argument already offered to prove that the usage to the extent claimed is not unreasonable, yet if its operation be restrained to that of a license to ship under such circumstances, revocable at the will of the owner, it will hardly be contended that there is any thing unreasonable in it. And if it be limited to a mere license, in the absence of orders to the contrary, still *Donnell* was not entitled to the freight.

It will be observed that there was no prohibition on the part of *Donnell* to take the goods in question. There is, on the contrary, an almost necessary implication, in *Donnell's* first letter, that he might do it. He says, "but it is understood that you are not to put any copper or heavy articles on board at *Chili.*" The prohibition for that particular part of the voyage, and the perfect silence of *Donnell*, with respect to the voyage from *London* to *Chili*, strongly implies an actual permission. But we do not put the point on the ground of actual or implied permission in the writing; our object is to shew that it was not forbidden in the writing.

It has been already remarked that the usage, sanctioned by the court, is a usage confined to the circumstances of this case. It is one of its circumstances, that there was no prohibition to do the act. If then it was the usage of trade, not to charge freight on the captain's private adventure, when the ship was in ballast, unless the captain was notified that it would be charged—if the usage was in the nature of a license only, and revocable at the will of the owner, it would still, as the license had been acted on, have become compulsory and binding, and could not be recalled, and *Donnell* would not be entitled to demand the freight. *Winter vs. Brockwell*, 8 *East.* 308, is full to this point. And we think it would be difficult to shew that a usage was unreasonable, which merely inferred a license, and did not become a vested right in the captain and compulsory on the owner, until it had been executed. This point need not be enlarged on, as it cannot be deemed a necessary one to maintain the opinion given. It may be proper, however, to remark, that even in *Donnell's* account, *Pawson* is not charged with freight on these goods, although freight is charged on *Goddard's* cordage, to the amount of more than one fourth of what it sold for. If the spirit which concocted that account, could not work itself up to charge freight on *Pawson's* goods, the usage to the contrary must indeed have been well known and established. The omission to do so in such a paper, would seem of itself conclusive proof of the usage, and of the reasonableness of the usage too.

In contending that the usage was a reasonable one, we have stated that the goods did not exceed the ordinary extent of a captain's private trade in such a ship. The amount that a captain may ship, must depend on the limits of the usage. The amount actually shipped appears in the evidence, and was one of the "circumstances" by which the jury were to try, whether the shipment was within the boundaries of a known and established usage. If it exceeded the amount fixed by the usage, it was not protected by the opinion of the court; and whether it did, or did not exceed it, was a question of fact for the jury, and was one of the "circumstances" by which they were to be governed. This is mentioned in order to shew that the usage contended for does by no means imply the right of the captain to ship any quantity of merchandize he may think proper, however large. The amount, like other customs, must depend on the nature of the trade, and the size of the vessel. It must not exceed the ordinary and reasonable extent of the private trade of a captain in such a vessel, engaged in such a voyage. There is a standard therefore sufficiently certain, whereby the jury may try it—a rule as certain as that whereby they try "*reasonable skill and judgment*" and "*reasonable diligence*," when those questions, as happens very often, are questions for the jury, and not for the court. In this case, the amount shipped, including commission, &c. was 1115*l.* 13*s.* 3*d.* *Pawson* took with him for his private trade, 1165*l.* 9*s.* 1*d.*—and this sum it appears, was taken with *Donnell's* consent and knowledge, and in a bill drawn by him on his agent in *London.* Moreover, *Donnell* procured the amount shipped, to be insured, and charged a commission on it. These facts furnish evidence from which the jury might very well have found, that the merchandize in question, did not exceed the ordinary private trade of the captain in such a ship on such a voyage: and, that a private trade of this description is well known and understood, appears by *Abb. on Ship.* 213. The other circumstances to which the usage was confined—that is, that the ship was in ballast—that it did not delay her—that it did not injure the owner, nor interfere with the objects he had in view—that it was done for the purpose of advancing the interest of the owner—that it was not forbidden—that the act was done before freight was claimed—do not appear from the evidence to have been susceptible of controversy. They might surely be all found by the jury upon the evidence as it appears in the record. And if these "*circumstances*"—these facts were all found by the jury, it is submitted to this court to say, whether the usage claimed can be deemed to be against justice—against positive law—or inconsistent with the rights of the owner.

Second Point.—Are *Pawson's* administrators entitled to recover any part of the $2000, mentioned in Donnell's letter of November 18, 1819? And if they are entitled to recover a part, what proportion are they entitled to recover, and by what rule is that proportion to be ascertained?

The appellant has raised *three* questions on this part of the controversy; and these questions are supposed to arise under the 3d, 4th, 5th, 7th and 8th exceptions.

1st. He insists that *Pawson* violated his duty as supercargo, and thereby forfeited all claim to wages in that character.

2d. That the compensation in question is an entire one, to be paid for an entire service, and is not subject to apportionment, by a part performance of the service.

3d. That if it be subject to apportionment, yet it ought not to be apportioned in the manner directed by the County Court.

It is of importance to attend to the exceptions to which these objections are referred; for it will be found that some of the questions made here, are not warranted by the record, and do not appear to have been decided by the County Court.

1. The objection, *first* above stated, is said to arise under the 3d, 7th and 8th exceptions. To support this objection, *Pawson* is charged with misconduct in the following instances:—1st, in taking the cordage on freight: 2d, in taking the passenger: 3d, in concealing these acts; and 4th, in the shipment of the gold and silver bullion at *Guasco.*

The 8th exception certainly does not bring up either of these objections. For, according to the principle maintained by the appellant in this exception, the appellees' right to recover any part of the $2000 is made to depend *on the receipt by Donnell on board his ship* of a sufficient quantity of copper to exhaust the funds, placed by him in the hands of *Pawson.* The prayer, is, that unless "he received on board his ship" this quantity of copper, the appellees cannot recover this part of his wages. If this notion be correct, then although *Pawson* most faithfully and most skilfully discharged his duty according to the very letter of his instructions, still he is not entitled to recover his wages, unless *Donnell's* funds had the good fortune to come safe to his hands in his own ship. Such a proposition can hardly be sanctioned by this court. The exception obviously raises no question on the legal effect of any supposed misconduct on the part of *Pawson.* It does not suggest that any misconduct has been committed by him; and if objections exist on that score, they cannot be considered under this exception.

It is also supposed by the appellant, that the acts of misconduct above stated furnish a sufficient ground for the absolute direction that the plaintiffs were not entitled to recover, prayed for in *the 7th exception.*

If it be even admitted, for the sake of the argument, that the acts of misconduct above mentioned might bar the claim for wages as supercargo, yet the court even in that case could only have given a hypothetical direction, and could not have given the absolute one asked for by the appellant. For each of the acts above stated may, or may not be acts of misconduct. For example—the taking of the passenger is not of itself an act of misconduct by the captain; for merchant vessels generally desire to obtain passengers. And if the passenger in this case was taken by the permission of *Donnell*, express or implied, it would not be a violation of *Pawson's* duty; and whether such assent was or was not to be inferred from the evidence, was a question of fact; and therefore a question for the jury. So too as to the concealment alleged in the argument; it was a question of fact for the jury. And if the shipment of the silver and gold be a breach of duty in any body, it is surely a question of fact, whether it was or was not shipped by *Pawson* or by his directions. If, therefore, it had been the intention of the counsel for the appellant, to found this prayer on any of these supposed acts of misconduct, the prayer offered should have been hypothetical; that is, "if the jury find from the evidence, that the passenger was taken by *Pawson*, contrary to his duty as supercargo;" or, "if the jury find from the evidence that *Pawson* concealed his conduct from the owner;" or, "if the jury find from the evidence that the silver and gold was shipped at *Guasco* by *Pawson*, or by his orders, contrary to his duty as supercargo." In this, or a like form of prayer, the question of law would have been put to the court, whether such misconduct forfeited his wages. But as the prayer stands in the record, the court were called on to decide the questions of fact, as well as the questions of law. If there were no other objections, this alone would have been sufficient to warrant the opinion given by the court in the 7th exception.

In speaking of the acts of misconduct under the 7th exception, the shipment of the cordage is not mentioned. Because this item is distinctly presented by the appellant in the 3d exception, and it is therefore unimportant whether he can or cannot avail himself of it, under the 7th. But the alleged misconduct in relation to the passenger; the concealment; and the shipment of the gold and silver, are not embraced in the 3d exception; and if these objections cannot be brought under the 7th and 8th, it is useless to discuss them; for they are not presented by the record. We have already shewn, that these three items of misconduct cannot be sustained under the 7th and 8th exceptions; neither are they included in the third; for this applies to the misconduct of "taking on freight prohibited articles," and to no other misconduct. Now the passenger and the concealment are obviously not within this description; and the gold and silver were not taken on freight, but were put on board as the property of the owner and the captain, and therefore are not embraced in the supposed misconduct, described in the 3d exception. We cannot, therefore, be called on to defend ourselves against these three instances of supposed misconduct. These questions are not brought up by the record.

With respect to the remaining item in the account of misconduct; that is—the cordage which is the foundation of the 3d exception, it is abundantly answered by the treaty between the *United States* and *Spain*. The cordage was not prohibited as contraband; 1 *vol. Laws of the United States, p.* 272. *Pawson* did not, therefore, in this particular take on freight prohibited articles.

But let it be supposed, that these questions of supposed misconduct are all brought here by the 7th exception, and that this court will decide the fact as well as the law.

The case of the cordage is already answered; there was in fact no misconduct, because it was not a prohibited article.

In the case of the passenger, if any misconduct was committed it was done as captain; and if any wages were forfeited by it, it must have been the wages of captain. Yet the right to these wages is not disputed. They are admitted in *Donnell's* account. The wages now in question are the wages as supercargo, and they are so called by the appellant in the prayers in the 3d, 4th and 5th exceptions; and the recovery is resisted altogether on that ground. If the conduct of *Pawson* forfeits any wages, it must forfeit the wages of the captain, rather than those of the supercargo.

But if the taking of the passenger be considered as the act of the supercargo, or that being done by him as captain, it shall nevertheless affect his title to wages as supercargo, still it is incumbent upon the appellant to prove, that this act was a violation of *Pawson's* duty. He makes the charge; he must therefore prove it. He must prove that he did the act, and that the act done was a violation of his duty. The evidence is, that the act in question was not a violation of his duty to *Donnell*, for it was sanctioned by *Donnell*. See *Donnell's* account. In the second item of this account, he charges *Pawson* with "short credit, allowed for passenger from *London*, £25." The words in which this charge is made strongly imply, that the passenger was taken in the ordinary course of business, and was a matter to be adjusted in the account between them, and not a matter to forfeit all title to wages, on the part of *Pawson*. *Donnell* claims the benefit of the contract made by *Pawson* with the passenger, and thereby certainly adopts it, and treats it as a contract made by his agent for him. He differs indeed with *Pawson* as to the manner in which the passage money is to be distributed. But no question upon that subject is presented by the exceptions. The question here is, did the act of taking the passenger forfeit his wages as supercargo? Not, how is passage money to be divided? And it is apparent from the evidence, that *Donnell* believed Pawson to have acted in this respect within the scope of his duty.

The charge of improper concealment is so entirely unsupported by the proof, that we are at a loss to know what part of the testimony is relied on to support it. It is a question of fact not involved in any one of the exceptions, and not countenanced by any part of the testimony.

The charge of misconduct, in relation to the shipment of the gold and silver, is not better supported than that of concealment. The gold and silver was shipped after *Pawson's* death. It was shipped at *Guasco*, (see account of *Edwards & Stewart.*) Captain *Pawson* died at *Coquimbo*, before the ship sailed for *Guasco*. It has been said that the shipment was made by his orders, although made after his death. This is a mistake. He left no orders on the subject. From the beginning of his illness, he was incapable of giving any. (See letters of *Edwards & Stewart*, December 8, 1820, and January 19, 1821.) We might indeed safely admit that he intended, if he had lived, to have shipped the silver and gold. But even if this shipment would have forfeited his wages, still as it is perfectly clear that he did not do the act, nor cause it to be done, it can never be contended that the mere intention to do it would work a forfeiture. There can be no such principle known to the common law. It is contrary to its whole spirit and provisions. Besides, the shipment did not put in jeopardy the ship, nor the owner's interest therein.

In this case too, as well as in that of the passage money, the evidence is that *Donnell* adopted the acts of *Pawson*, and sanctioned them by his assent. He was informed of *Pawson's* intention to ship the silver. (See letter of November 4, 1820.) This silver was to be a part of the 6,000 dollars which *Donnell* was requested to insure. He did ensure, and charge a premium for his agency in procuring the insurance. (See his account.) He has thus made a profit on this shipment, and took no steps whatever to indicate to *Pawson* that he disapproved of it. It forms no part of his defence in his account. Surely, all of these circumstances furnish conclusive evidence, that *Donnell* did not deem this shipment a violation of *Pawson's* duty to him. He regarded it, and treated it as a part of the ordinary business of the voyage.

If therefore this court, under the 7th exception could decide the facts as well as the law, in these four alleged instances of misconduct, yet the testimony in every one of them fully justifies *Pawson*, and shows that he faithfully discharged his duty: The appellants fail in the facts, if the court deem it proper to try the facts on the evidence.

But suppose we are wrong in both of the propositions we have endeavored to maintain. Let us assume, for the sake of the argument, that the objections are presented by the record, and that the acts of misconduct imputed to *Pawson* are sufficiently established; it remains to inquire, whether such acts of misconduct will forfeit all title to the wages stipulated in the contract.

In this aspect of the case, the point to be decided is this, an agent has faithfully and diligently performed his duty to his principal, according to the best of his judgment. Nothing is done, or omitted to be done in bad faith. The services have been rendered by the agent and accepted by the principal, and a large profit reaped from them. Yet the agent is supposed, in some particular instance, to have mistaken the precise line of his duty; and to have departed from it; and, by this departure, the gains of his principal are in a slight degree lessened. It is said by the appellant, that in such a case this injury to the principal, however small, forfeits the wages of the agent, however large. It is even said they are forfeited, although the owner sustain no injury. No authority has been produced to maintain either of these propositions, and it is believed that none can be found.

The principal is not without remedy in the case supposed, provided he has sustained damage. The law will not indeed forfeit the wages, by way of penalty upon the agent. Neither can the principal, technically speaking, *set off* the amount of injury received by him, in bar of the claim for wages. 1 *Peak. Ev.* (*Norris' edition*,) 416. *Winchester vs. Hackley*, 2 *Cranch. Rep.* 342. But he may maintain an action against the agent, and recover damages, commensurate with the injury sustained. And in this suit *Donnell* was at liberty to have shewn, if he could, that the duty of supercargo was not performed with fidelity and skill, and have thereby diminished the wages to be recovered, in proportion to the injury he had sustained. And he might have defeated the claim altogether, if it had appeared to the jury, upon the evidence, that *Pawson* had performed the trust so negligently, unskilfully, or unfaithfully, that he was not entitled to demand compensation. 1 *Com. on Cont.* 226, 227, (edition of 1809;) 2 *Stark. Ev.* 642, 644, (*note.*) *Farnsworth vs. Garrard*, 1 *Camp.* 38. But *Donnell* does not rely on this defence. The record presents no question on these points. *Donnell* insists that there has been a technical violation of duty by *Pawson*, and that the law visits it with the total forfeiture of his wages. And, after having received the benefit of the services, he now claims the benefit of the forfeiture. The claim is not founded in justice, nor is it supported by authority.

If therefore the points raised were presented by the record, and the imputed acts of misconduct could be proved, still all right to the wages would not be forfeited, and consequently the prayer, contained in the 3d and 7th exceptions, ought not to have been granted. We have already shewn that the 8th exception presents a different question, and have offered argument upon it.

2. We proceed to the *second* objection, in relation to the $2,000. It is said that the performance of the whole service is a condition precedent to the recovery of any part of the compensation; and that, as *Pawson* died before the service was completed, his administrators can recover nothing for the services actually rendered.

This point is presented in the 5th exception, and in none other.

It is very clear that the court was right in refusing to give the direction prayed for. The appellant called on the court to decide, what is obviously a question of fact, and a disputed question of fact. The prayer, after stating the services for which the above mentioned sum was supposed to be compensation, proceeds thus:—"that the voyage having been altered *by the consent of parties*, (*as appears by the said correspondence*,) by striking out that part of it which related to the trip to *Canton*, and directing the destination of the ship from *Coquimbo* to *Baltimore*, without saying any thing of the aforesaid compensation to *Pawson* as supercargo, that stipulation attached to the new voyage precisely in the same manner, in which it had attached to the original voyage," &c. &c. This quotation is made from the prayer, in order to shew that the stipulation is supposed to attach on the new voyage, as it has done to the old, by reason of the agreement to substitute the new voyage for the old one. The agreement then to alter the voyage is the foundation on which the prayer is placed by the appellant. It can be supported on none other. And he calls upon the court to say, not only that the agreement had been "altered by the consent of the parties," but also that this alteration "appears by the correspondence." In other words he assumes, that the correspondence being in writing, it is the province of the court to say, whether the consent of *Pawson* to the alteration in the voyage is to be inferred from it or not. We deny that it is within the province of the court to decide this question. One of the facts in controversy between the parties, as appears by the record, is whether *Pawson* did or did not consent to this alteration. The appellant says he did assent, and thereby waived the old agreement and made a new one. The appellees, on the contrary, insist that he merely obeyed the orders of his owner; that it was his duty to obey, and being his duty, his assent to the change cannot be inferred from the fact that he performed the new voyage cheerfully, and without objection. And they maintain therefore, that the original contract was never waived by *Pawson*, and the rights of the parties must still be decided by this agreement.

In this state of the controversy, can the court undertake to decide the question, whether *Pawson* did or did not consent to the alteration? Is it not a question of fact? It does not depend upon the construction of any particular paper, but depends upon inferences to be drawn from the whole correspondence, and the acts of the parties taken together. It is therefore a question for the jury. *Etting vs. Bank of United States*, 11 *Wheat.* 75, 76, is in point.

If we are right in these views, the judgment of the County Court upon this exception must be affirmed.

But let us waive this objection and examine the point of law proposed to be raised by the appellant, under this exception.

The ship sailed from *Baltimore*, Nov. 19, 1819. She returned October 21, 1821, having been absent nearly two years. *Pawson* died December 4, 1820, having been actively and laboriously engaged in the service of *Donnell* for more than a year. At the time of his death he had nearly completed the duties of his agency, and had, by his faithful services, insured to *Donnell* a gainful voyage. *Donnell* accepts all the benefits, which the labours and services of *Pawson* had procured for him; but contends that *Pawson* is entitled to no compensation for these services, because he died before the duties of the agency were entirely completed. According to this principle, if only a single hour's work remained to be done when *Pawson* died, his representatives would be entitled to nothing for his services, even although these services had occupied many years of his life, and had enriched the appellant. Is this the law? The principles of moral justice are opposed to it; and it cannot, we think, be supported by the authority of adjudged cases.

The cases upon this point are collected together, and the rule laid down in *Portage vs. Cole*, 1 *Saund.* 320, (*note* 4,) as relates to sealed instruments.

The conclusion from all the cases is stated as follows: "Hence," (says Sergeant *Williams*,) "it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that when a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part, without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained, in not having received the whole consideration."

The same principle applies to contracts, not under seal, with this difference that the defendant is not put to his cross action, as in cases of covenant. But if the contract has not been fully performed by the plaintiff, the defendant may show it, and the plaintiff will be allowed to recover to the extent of the benefit derived by the defendant, and no further. 2 *Stark. Ev.* 643, 644, and (*note n.*) The doctrine is so clearly laid down in this authority, that we must beg leave to ask for it the particular attention of the court. For in strictness, &c. "But still," (*says Starkie, in page* 643) "if the defendant be benefitted to a certain extent, and does not repudiate the contract in toto, it seems to be a rule of policy and convenience, as well as of equity and justice, that the plaintiff should be allowed to recover to the extent of the benefit derived by the defendant, and no further."

Whatever therefore, may have been the ancient decisions upon this subject, it has for many years been settled in the *English* courts, that in ordinary contracts, with or without seal, the defendant according to the principles of the common law is liable, in proportion to the benefit derived from the contract, although he may not have received the whole consideration for which he stipulated; provided the plaintiff is not in fault, and does not possess the power to perform the whole stipulation. This is the general rule applicable to contracts. It is however admitted that if, from the words of the contract, it appears that the parties intended that the entire performance should be a condition precedent to the payment of any part of the compensation, then such condition, like every other condition precedent, must be strictly and entirely performed. For the parties have a right to contract as they please. But in order to produce this result, it must clearly appear from the words of the contract, that such was the intention of the parties; and such was the case of *Cutter vs. Powell.* The same principle prevails in commercial contracts.

If a seaman is prevented by a superior power from performing the service he contracted to perform, he is entitled to a proportional part of his wages; as in the case of sickness or death of the mariner; and also in the case of impressment. *Abb. on Ship.* 426, (and *note* 1,) 427, (and *note* 1,) 433, (and *note* 1.) In these passages in *Abbot*, the doctrine is summed up, and the leading authorities referred to. And the cases given in the last mentioned page, seem to be conclusive on this point. The same principle is fully supported by the following authorities:—*Hart vs. Ship Littlejohn*, 1 *Peters Adm. Rep.* 115 to 121. *Johnson vs. Sims*, *Ib.* 215, *Poth. Marit. Cont. Placita*, 179 to 193.

If it be said that contracts for personal service stand on different grounds from other contracts, and that the performance of the whole personal service stipulated is a condition precedent to the payment of any part of the stipulated reward, for which the service is the consideration, the answer is that no good reason can be given in support of such a distinction. Neither do the authorities sanction it, for the cases of maritime contracts above quoted, were cases of contracts for personal service. Many of the cases upon the subject of hiring by the year relate to the time when the wages may be demanded—the time when they become payable. If they were to be paid at the end of the year, they cannot be demanded before. *The King vs. Inhabitants of Whittlebury*, 6 *T. R.* 467. 3 *Stark. Ev.* 1766.

And in the case of *Cutter vs. Powell*, so often referred to, it is distinctly admitted in the argument of the counsel for the defendant, and sanctioned by the court, that in the common case of a hired servant who contracts by the year, and dies in the middle of it, his executors may recover a part of his wages, in proportion to the time of service.

The case mainly relied on by the appellant, is the case of *Cutter vs. Powell*, 6 *T. R.* 320.

This case was manifestly not decided upon any general rule of law applicable to contracts for service, but was decided upon the special terms of that particular contract. The Judges say so in delivering their opinion, and the unusually high rate of the wages is greatly relied on by two of the Judges, for the purpose of proving that the wages were to be contingent and not certain. There is no circumstance like that in the present case. In *Abb. on Ship.* 429, in speaking of the case of *Cutter vs. Powell*, it is said to have been decided "upon consideration of the particular terms of the note, and of the great excess of the sum to be paid to *Cutter*, if he had performed the whole voyage according to those terms, above the usual rate of wages upon a monthly hiring."

The case of *Countess of Plymouth vs. Throgmorton*, *Salk.* 65, referred to by *Lawrence*, Justice, in his opinion in the case of *Cutter vs. Powell*, might be sufficiently answered by saying, that if it be contrary to the cases above referred to, it is then overruled by them. In note (*a*,) page 323, of *Cutter vs. Powell*, it is said that the ancient law was different from what the modern is in that case conceded to be.

But a further sufficient answer may be given. The case of *Countess of Plymouth vs. Throgmorton*, does not justify the account given of it by Justice *Lawrence*: He says, in speaking of this case, "it was argued that without a full year's service nothing could be due, for that it was in the nature of a condition precedent; that it being one consideration and one debt, it could not be divided; *and this court were of that opinion, and reversed the judgment.*"

Now it does appear, it is true, that the argument above stated was offered by *Sergeant Holt*, who was counsel in the case. But it does not appear that "the court were of that opinion," as is stated by Justice *Lawrence*. The report in *Salkeld* does not say so. For after giving the argument of counsel it says, "*judgment reversed*," and does not profess to give the grounds upon which the court decided. The doctrines maintained by the counsel in argument are not ascribed to the court, by the reporter. The full copy of the record of this case will be found in 3 *Salk.* 784; and it is apparent upon looking at it, that the declaration could not be supported, and that the judgment in the court below ought to have been reversed on the pleadings. The declaration states the contract in substance to have been, "that the earl of *Plymouth* authorized *Edward Picke* to demand and receive all sums of money then due to the earl of *Plymouth*, or that should become due in the next three years, and to apply the same as the earl of *Plymouth* should by writing direct; and for his care and labour in the premises, the said earl engaged to pay him a hundred pounds a year for three years. The declaration then avers, that the said *Edward* afterwards, for the space of three quarters of a year from thence next following, from time to time, "*solicited and requested divers persons the debtors to the said earl, to pay sundry sums of money at that time due and payable to the said earl,*" *&c. &c.* Now, it will hardly be contended that this is a good averment, that the service stipulated was performed for any space of time. The duty averred to have been for three quarters of a year, is not the service contracted to be done; and there is in this declaration no good and legal averment of performance of the service contracted for, even for a single day. The case therefore must have been reversed on this ground; and it certainly does not appear that the court decided it on the ground, taken by counsel in the argument.

These two cases then can hardly be sufficient to outweigh the many authorities produced in support of the opinion of the court. And it would indeed hardly be desired to find authorities to support the principle maintained by the appellant. For if he be right, then where a slave is hired by the year, and dies an hour before the expiration of the year, his master loses his wages. So too the family of an overseer would lose the fruits of his labour, if he died an hour before the expiration of the year. And although such contracts of hiring have been common for a long time in this State, it has never been supposed that the accident of sickness or death would prevent the party or his representatives from recovering for the proportion of the service actually rendered. Yet according to the doctrine maintained by the appellant, if by sickness or death *Pawson* was prevented from performing the most trifling proportion of his duty, he was entitled to nothing; the contract being an entire compensation for an entire service, and not subject to apportionment. There is surely nothing like justice in the rule to recommend it to the favour of the court.

It has been also insisted on the part of the appellant, that the expressions in *Donnell's* letter, that the $2000 were to be *payable on Pawson's return*, make his return a condition precedent, and that the right to the wages depends on the happening of this contingency.

In reply to this argument, it is sufficient to refer to 1 *Pow. on Cont.* 267, 268. *Abb. on Ship.* 433, 434, (*note* 1.) The words in *Donnell's* letter do not create a condition; they are modal only; and relate to the manner in which the contract shall be performed.

Assuming then that *Pawson* had not by misconduct on his part forfeited all claim to wages as supercargo; and that the compensation agreed upon is subject to apportionment; the only remaining question, in relation to this part of the subject is, whether the County Court have given the true rule.

This question is brought up by the 4th exception, and can arise under none other. The rule of apportionment is given in the opinion of the court, and according to that rule it is to be graduated by the time *Pawson* was actually in service; and the opinion assumes that the duty of supercargo commenced with the voyage, and terminated on the signature of the bill of lading.

We do not know that the court are supposed to have erred in fixing the commencement of the voyage as the time when the service commenced. *Pawson*, it is true, was both captain and supercargo, yet in estimating his wages as supercargo, we cannot take into consideration that he was captain. He must be dealt with as if a different person had been captain, and he nothing but supercargo. And if that had been the case, it would be too obvious for argument, that his service began when the ship sailed from *Baltimore*. 2 *Liv. on Agency*, 215.

But although the time when the service commenced is not questioned, yet the time when it terminated is disputed, and it is said the court have erred in the time mentioned in their direction.

If the court have erred in this respect, the appellant has no right to complain of it. For in his prayer, he assumes, that the duty of supercargo terminated when he had completed the investment of the appellant's funds. The court consider it as terminating upon the signature of the bill of lading for the homeward voyage; and this must necessarily happen after the investment of the funds in the homeward cargo. The court therefore, have in their direction, made the portion of time lost by the death of *Pawson*, to be greater than the defendant asked for; and have given, in this respect, to the appellant more than he demanded. He, therefore, cannot allege error in that part of the opinion.

But if we put aside this answer, which is believed to be quite sufficient on this subject, yet it can easily be proved by authority, that the court have not erred in fixing the time when the service ended. For, in the first place, the duties of master and of supercargo are known to the law, and need not be proved as matters of fact. And in the second place, the goods would have been in the charge of *Pawson* as captain, and not as supercargo, from the signature of the bill of lading until the end of the voyage. These propositions are both proved by the following authorities: *Kendrick vs. Delafield*, 2 *Cain. Rep.* 67, 72. *United Insurance Company vs. Scott*, 1 *John. Rep.* 111, 115. 1 *Liv. on Agen.* 69, 72. 2 *Liv. on Agen.* 215. In the case of *Kendrick vs. Delafield*, the same person was captain and supercargo, and in that case, *Kent*, Justice, says: "The captain did not, and could not lay aside his character and responsibility as master, until the vessel had performed her voyage, and arrived at the port of destination." His expressions marking out their relative duties, are equally strong in the *United Insurance Company vs. Scott.*

The bills of lading are the contracts of the master, as master, that he will carry the goods to the port of destination. *Abb. on Ship.* 217, 218. See the bills of lading in the record. After the bills of lading were signed, what more had the supercargo to do? It would then have become the duty of *Pawson*, in the character of captain, to take the goods to the port of *Baltimore;* and during the voyage, and until the arrival in port, the cargo, if he had lived, would have been in his charge as captain, and the supercargo would have had no right to interfere. Upon the arrival of the vessel in *Baltimore*, the cargo was to be delivered to *Donnell* himself, or his order. The supercargo, therefore, had nothing to do, and could not lawfully interfere, after the bill of lading was signed. His services ended at that time, and the court below were right in fixing that as the period, at which his duties terminated.

It has been said that the authority of supercargo did not end at the time above mentioned, and that it was his duty to be on board the vessel on her homeward voyage, because he had the power during that voyage to alter the destination of the cargo. The answer to this argument is, that it would have been contrary to the orders of *Donnell* to have changed the destination of the ship, and take the copper to any other port. And the law hardly makes it the duty of a supercargo to be on board, in order that he may have an opportunity of committing a breach of duty. The law will not require his presence, unless he may have some duty to perform. If the court were right in fixing the time of the commencement, and of the termination of the duty of supercargo, we do not know that any other error is supposed to exist in the direction. The principle of apportionment adopted by the court, is the same with that prayed for by the appellant. His compensation, as supercargo, is not measured solely by the time he was engaged in buying or selling cargo; but the time occupied in getting to the scene of action is considered as a part of his time of service. It is difficult to imagine any other just rule of apportionment. For his time and labour were his capital, and while he was on his voyage, as supercargo, to *London* or to *Chili*, he was incapable of engaging in any other profitable occupation. This service so engrossed his whole time, as to exclude, necessarily, any other business. If he was in service, he was, of course, earning wages during all that time.

But it seems to be supposed that there ought to have been a deduction from the $2000, on account of the alteration in the voyage, and that the court erred in refusing that part of the prayer.

The claim to this deduction is not based upon the notion that *Pawson* assented to the change, or assented to any diminution of wages. His agreement in this prayer is put out of the question. And the appellant, in effect, contends that if the voyage originally contemplated, was abandoned by the orders of *Donnell*, and without the consent of *Pawson*, that the latter is entitled to wages only in proportion to the service actually rendered, and not according to the contract made between the parties.

If this principle be sound, it leads to this conclusion, that if the ship had been ordered back from *England*, and the whole speculation given up, *Pawson* could have recovered in proportion only to the duties actually performed. In other words, if *Pawson* was prevented by *Donnell* from performing the service, *Donnell* is not bound to make him any compensation. The whole current of authorities stand in opposition to this doctrine. *Pawson* sails on the voyage originally planned, and for which he was to receive for his services as supercargo, $2000. When he is in *England*, and after he had put himself out of the way of other employment, by proceeding to execute this contract, *Donnell*, without consulting him, and in the exercise of what was no doubt his lawful power, orders the voyage to be altered. It is altered in obedience to his order. *Pawson* is ready to perform his engagement, but he is prevented by *Donnell.* Is he not entitled to demand the pay when he is ready to perform the service? *Donnell* does not appear at that time to have entertained the notion that the wages were to be cut down, because the voyage was altered. He does not suggest it in his letter to *Pawson*, and their is nothing either in his letter or in that of *Pawson* in reply, from which it can be inferred that either party looked to any change in the wages agreed on before. On the contrary we think that the jury might and ought to have inferred, from the silence of both parties on the subject, that both of them understood and agreed that the compensation as it stood in the original contract was to remain unchanged. And if the jury might possibly have so inferred from the testimony, then the absolute direction asked for ought not to have been given.

But putting aside any supposed understanding between the parties, we come to the question of law proposed to be raised on this exception. And we maintain, that inasmuch as *Pawson* was ready and willing to have performed the service originally agreed on, and was prevented from doing so by the orders of *Donnell*, he is entitled to recover from *Donnell* the whole compensation originally contracted to be given. This principle, however, is involved in the questions relating to *the Canton privilege.*

Third Point.—Are the administrators of *Pawson* entitled to recover compensation for the privilege of twenty-five tons, from *Canton* to *Baltimore*, stipulated in *Donnell's* letter of November 18, 1819, and of which *Pawson* was deprived by the act of *Donnell*, in changing the voyage originally contemplated?

The only remaining subject of controversy between the parties is the privilege of twenty-five tons from *Canton* to *Baltimore*, stipulated in *Donnell's* letter of November 18, 1819. The questions on this part of the dispute arise out of the 2d, 6th and 9th exceptions. The points presented by the other exceptions have been already disposed of.

In the *second* exception, as in some of the others hereinbefore examined, it will be found that the appellant called on the court to decide a question which properly belonged to the jury; and that the court were on that account right in refusing the prayer, if it had even been open to no other objection.

In this exception, the appellant in his prayer in the first place assumes as a fact, that the voyage had been "altered by the direction of the defendant and the *consent of Captain Pawson*," and prays the court to instruct the jury that "the privilege stipulated for Captain *Pawson* to bring home twenty-five tons from *Canton*, clear of freight, was *voluntarily relinquished by him, and exchanged for the privilege of bringing home his funds in copper from Coquimbo.*"

Now there is no paper by which *Pawson* is supposed to have relinquished his privilege to *Canton*, and exchanged it for a privilege to bring copper from *Coquimbo*. There is no paper the words of which are supposed to imply such relinquishment or exchange. The relinquishment and exchange is inferred in the argument, from the correspondence and the acts of the parties. If he has relinquished and exchanged in the manner supposed, he has not done it in writing. It is not contended that it is done in any one of the letters or papers contained in the record. And if it is supposed to be a parol relinquishment and exchange, to be inferred from the whole correspondence and the acts of the parties taken together, then surely the question, whether there was such a parol relinquishment and exchange, must be for the jury and not for the court. *Laidlaw vs. Organ*, 2 *Wheat.* 183. *Etting vs. Bank of the United States*, 11 *Wheat.* 75. Both of these cases are believed to be fully in point, and to show that the court were right in refusing the prayer made by the appellant.

The two cases, relied upon by the appellant to prove that this is a question for the court, will be found to be distinguishable from the case before the court, and the cases in *Wheaton.* In *Macheath vs. Haldimand*, 1 *T. R.* 172, 180, the question was, whether the party who purchased for the government had made himself *personally* answerable. And this depended on the words of his written contracts; that is, on his letters, orders, &c. It was a question upon the interpretation of the written words, and therefore belonged to the court.

In *Ferris vs. Walsh*, 5 *Harr. & Johns.* 308, it was also a question upon the construction of the written instruments taken together: did the written words amount to a guaranty? Was such the true meaning and construction of the words in the instruments of writing? These questions without doubt belonged to the court, whose office it is to expound written instruments.

But the question here is a different one. It is not a question, what is the true meaning and construction of any or all of the letters. It is an attempt to infer from the correspondence a waiver and exchange, which the words of the letters do not imply. It is an attempt to infer another fact from the facts proved. The case of *Etting vs. Bank of the United States*, 11 *Wheat.* 75, is precisely like it.

If indeed *Pawson* had voluntarily relinquished the *Canton* privilege, or exchanged it for one from *Coquimbo*, nobody would contend that he was entitled to damages for the loss of a privilege which he had thus voluntarily released, or had exchanged for another. But we insist that he neither relinquished nor exchanged it. The appellant replies to us, that the voyage was altered by the consent of *Pawson*, and that by such consent did he relinquish the privilege from *Canton*, and exchange it for one from *Coquimbo*. To this we answer, 1st, that whether *Pawson* did or did not consent to the alteration is surely a matter of fact, and not a matter of law, and the court cannot assume the fact. He might have written and acted in the manner he did write and act, because he supposed he was bound to obey the owner and had no right to refuse. And he was undoubtedly bound to obey; and his obedience to the orders of *Donnell* cannot therefore be evidence of a waiver of his rights. At all events, his obedience is not *conclusive* evidence of such waiver, as is assumed by the appellant in this prayer. In the second place, if the consent of *Pawson* was admitted, it does not follow as a conclusion of law, that by such consent he relinquished the privilege from *Canton*, and exchanged it for a privilege from *Coquimbo*. The jury might indeed infer such relinquishment and exchange, from the fact of consent, but it would be an inference of fact and not of law. It would be a matter for the jury to decide, and not for the court. For the consent to the alteration might be given, reserving the right to demand compensation on account of the *Canton* privilege. The consent, and the right to compensation for the privilege might exist together. They are not inconsistent with one another. The relinquishment and exchange of the *Canton* privilege could not therefore be the legal consequence of *Pawson's* consent to alter the voyage. And upon either of the grounds above mentioned the court were right in refusing the prayer contained in this exception.

After refusing the prayer made by the appellant, the court proceeded to instruct the jury in the manner set forth in the same exception. The propriety of that instruction remains to be examined.

In this direction the court leave it to the jury to say, whether *Pawson* did or did not waive the benefit of the privilege from *Canton*. We have already endeavoured to show that the question, whether he did or did not waive it was a question of fact for the jury, and not a question of law for the court. It is unnecessary to repeat the arguments already offered on this head. We think we may safely conclude that the appellant was wrong in treating it as a matter of law, and the court right in dealing with it as a matter of fact.

But the court have gone further in their direction, and they say that if *Pawson* did waive the privilege from *Canton*, yet unless he did so with a knowledge of his legal rights, he is still entitled to recover an equivalent for the privilege lost. It is said by the appellant that no one can avail himself of the plea of ignorance of the law, and that if *Pawson* waived his privilege he is bound by it, and cannot allege that he did it under a mistake as to the law. The case of *Lammot vs. Bowly*, 6 *Harr. & Johns.* 500, is a complete answer to this objection, and so fully sustains the opinion of the court that it supersedes all argument, and saves us the necessity of producing and examining the mass of authorities on this subject. In that case, the court lay down the rule in the following words: "It is not intended to say that the plea of *ignorantia juris* would in all instances be available in civil cases, (in criminal it never can be,) because some legal propositions are so plain and familiar even to ordinary minds, that *it would be doing violence to probability to impute ignorance in such cases*; but it is only meant to say, that where the legal principle is confessedly doubtful, and one about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law, in such a case, shall not forfeit any of his legal rights by reason of such mistake."

The 9th exception is immediately connected with this subject, and the proposition contained in it appears to have been brought before the court, in consequence of the opinion set forth in the 3d exception.

In the prayer in the 9th exception, the court are called upon to assume that *Pawson* "*consented to the change of the original voyage*," and "*waived his privilege from Canton.*" Now it was not admitted, as we have already shewn, that *Pawson* consented to the change of the original voyage; and it was not admitted that he waived his privilege from *Canton.* Both of these matters were matters of fact, and both of them were in controversy between the parties. And the court were right in refusing the prayer upon this ground, even if there had been no other objection to it.

But if these questions of fact had, by the prayer, been left to the jury, still there would have been no error in this opinion of the court, and it was properly left to the jury to say whether, if *Pawson* had consented to the change of the voyage, and had waived his privilege to *Canton*, he had done so in ignorance of his legal rights. For the privilege from *Canton* is proved to have been a much more valuable one, than the privilege from *Coquimbo. Pawson* was a sea captain, toiling in his profession. *Donnell* is proved by the record to have been a merchant of great wealth. And it can hardly be imagined, that *Pawson* would have exchanged the privilege from *Canton* for one of inferior value, unless he was induced to do it by the ignorance of his legal rights. No other motive is assigned by the appellant, and it will scarcely be said that a man, trusted by *Donnell* with the execution of this great scheme of commercial adventure, could be ignorant of the relative value of the privilege from *Canton*, compared with a like one from *Coquimbo.* It is not necessary however for us to show, that there was *sufficient* evidence to prove his ignorance of the law. It is enough for us, that there was evidence tending to prove it. "Where there is any legal admissible evidence *tending* to prove the issue, the effect of that evidence is solely for the consideration of the jury." 1 *Stark. Ev.* 399, 400. In the case of *Etting vs. Bank of the United States*, 11 *Wheat.* 50, the chief justice in delivering the opinion of the court says, "If the testimony be examined, it will, we think, appear that the counsel for the plaintiff has not asked the court to give its opinion on any inferences of fact, which it was not *at least possible for the jury to draw from* *the evidence.* The knowledge of the Bank is not questioned. *The ignorance of Etting might be inferred from the absence of all testimony, proving his knowledge* that any fraud had been practised by Mr. *M'Culloh.*" It was surely *possible* for the jury, from the facts above referred to, and the situation of the parties, to infer that if *Pawson* had waived his privilege from *Canton*, that he had done it in ignorance of his legal rights. Indeed we might safely call on the jury to infer the ignorance of *Pawson*, from the absence of all evidence proving his knowledge. For the counsel for the appellant will not say that the legal rights of *Pawson* were plain and familiar; if they were plain and familiar, there would be no difference of opinion on the subject, between the County Court and the learned counsel for *Donnell.* Yet this difference of opinion is manifested by the 6th exception. And on a point of law, where either the County Court or the learned counsel for the appellant are in error, and that too after the most mature consideration, it would *be doing violence to probability*, to impute *knowledge* to *Pawson.* In such a case, his ignorance ought to be inferred, or at all events might *possibly* be inferred by the jury, from the absence of all proof or probability of knowledge.

The appellant has relied on *Keys vs. Parnham*, 6 *Harr. & Johns.* 418, and on the case *Davis vs. Davis*, 7 *Harr. & Johns.* 36, to shew that the court may direct the jury on the sufficiency or insufficiency of evidence to establish a fact. The present case does not require us to enter on a full discussion of this principle. There is no question about the sufficiency of evidence presented by any of the prayers in the record, and this court therefore are not called on to decide it. And besides we are very willing to leave it to the court to say, whether the evidence of *Pawson's* ignorance of the law is too slight and trifling to be left to the jury.

The 6th exception is the only one which remains to be examined. Was the privilege from *Canton* subject to the two contingencies mentioned in the prayer, and liable to be lost upon the happening of either of them? It appears in the evidence, that by the usage of trade, if the captain died, the privilege in question, survived to his representatives, and did not go to the captain who succeeded to the command of the vessel. There is no evidence of any contrary usage. The court could not, in opposition to such proved and undisputed usage of trade, say that "the death of *Pawson* at *Coquimbo*, in the course of that voyage, would have put an end to all claim by his representatives on account of this privilege;" and could not therefore give the direction prayed for. It has been said in the argument, that it does not appear that the privilege from *Canton* belonged to *Pawson* as Captain, and that it might have belonged to him as supercargo. If any doubt could be raised on this subject, we do not perceive that it would materially affect the argument. But the testimony puts it beyond doubt, that the privilege in question was a captain's privilege, and not a supercargo's. And the appellant in his prayer treats it as a captain's privilege, which he supposes was contingent on the death not of *supercargo Pawson*, but of *Captain Pawson.* Neither should the other contingency, mentioned in the prayer, have entered into the calculations of the jury. If the ship had pursued the voyage originally contemplated, and had been lost, *Pawson* might have lost the benefit of his privilege. Yet it does not necessarily follow that he would even in that case have entirely lost all benefit from it, as is assumed in the prayer. But waiving any discussion on that head, we insist that as *Pawson* was prevented from performing the voyage by the act of *Donnell*, the latter takes upon himself all the contingencies, and cannot claim an abatement on account of the hazards, to which the contemplated adventure was subject. This is the rule in the case of seamen's wages, which are always contingent on the safe arrival of the vessel. In *Poth. Mar. Cont. Pl.* 203, page 125, 126, it is said, "that if the ship is voluntarily, and of course by the master's act, unloaded in a place nearer than that which is designated in the contract of affreightment, the wages promised to a sailor hired by the voyage shall suffer no diminution." In *Hoyt vs. Wildfire*, 3 *Johns. Rep.* 518, it is said by chief justice *Kent*, "that the rule on this subject in the *English* law, does not, I apprehend, differ from the marine law of *France*, although I have not met with any adjudged case in point, and a recent *nisi prius* decision, *Eaken vs. Thom*, 5 *Esp. N. P. C.* 6, looks strongly the other way." And in *Sigard vs. Roberts*, 3 *Esp. N. P. C.* 71, at the conclusion of the case, Lord *Eldon* says, "this clause (*one in the shipping articles*) therefore cannot prevent the sailors suing for their wages when the master discharges them; the *voyage then is ended* as to the man who is discharged from the ship." The same principle is ruled by Lord *Ellenborough* in *Gondell vs. Ponteguy*, 4 *Campb.* 375.

"If the plaintiff was discharged (says Lord *Ellenborough*) without a sufficient cause, I think this action is maintainable. Having served a part of the quarter, and being willing to serve the residue, in contemplation of law he may be considered to have served the whole."

In *Cook vs. Jennings*, 7 *T. R.* 381, *Lawrence*, J. in delivering his opinion upon an action for freight, says, "but he is not entitled to the whole freight, unless he has performed the whole voyage, *except in cases where the owner of the goods prevents him.*" If then the owner of the goods prevented the ship owner from performing the voyage, the owner of the goods must pay the *whole freight*. There is no deduction for hazards or contingencies, which might prevent the ship from receiving freight. The case put by Justice *Lawrence* is in principle the very case under discussion.

These cases seem to establish firmly the proposition, that when the party is to be paid by the voyage, he is entitled to full wages if he is prevented by the owner or master from rendering the service. And he is not bound to abate any part of the stipulated wages, on account of the hazards of the voyage. In this case the privilege from *Canton* was a part of the compensation, and was by the voyage, and not by the time of service. It is supposed by the appellant that this part of the compensation was liable to be lost, by the destruction of the ship on the voyage. If this be the case, it is strikingly analogous to the case of seamen's wages hired by the voyage, and to the case of freight.

The following cases will be found to maintain the same doctrines.

Abb. on Ship. 424, 425 (*note* 1.) *Mahoon vs. The Glocester*, 2 *Peters Adm. Dec.* 403. *Rice vs. The Polly and Kitty*, *Ib.* 423, (*and note.*) *Limland vs. Stephens*, 3 *Esp. N. Pri. Cas.* 269. *Valin. Com. B.* 3. *Tit.* 4. *Art.* 3. 2 *Br. Adm.* 533. *Jacobson's Sea Laws*, 148. *Napoleon Com. Code*, *Art.* 250. *Sullivan vs. Morgan*, 11 *John. Rep.* 66.

In the case last cited, the seamen were hired by the month, and no freight had been earned. Yet they received their full wages for the time they had served, according to the contract, without any deduction on account of the danger, that the ship might have been lost on the voyage before freight was earned, and consequently before wages were due. This case is the same in principle with the one at bar. In both cases if the ship had been lost in the course of the voyage, the compensation contracted to be given would have been lost also. And as it was held not to be subject to abatement on that account, in one instance, it is difficult to imagine why it should be held differently in the other.

The case of *Hulle vs. Heightman*, 2 *East.* 145, turned upon the form of action. In the case before the court the agreement in the beginning of the record removes any difficulty on that score, and permits us to recover in this action any thing that could be recovered in any other form. Besides, in the case of *Hulle vs. Heightman*, the time of payment stipulated in the contract had not arrived, when the suit was instituted. In that case, the seamen by an express stipulation were bound "to assist in bringing the ship back again, and making her fast in a proper place, before they could make any demand upon the captain for the wages due." And as the homeward voyage was not abandoned, but was in the course of execution, the time had not arrived when the wages would become due, according to the terms of the contract. They could not therefore be sued for as if due. But in this case the original voyage had been abandoned by the defendant, long before this action was brought, and the original contract at an end. The wages were as fully due, at the time the suit was commenced, as they would be at any future time, and in this respect also the case before the court stands clear of the difficulty, which met the plaintiff in the case of *Hulle vs. Heightman.* Indeed that case furnishes another proof of the soundness of the principle for which the appellees contend; for it is not suggested that the wages are to abate on account of the hazard, that the vessel might be lost on the homeward voyage, before she was made fast in her proper place. On the contrary, it appears to have been conceded on all hands, that if the seamen were entitled to recover any thing in that action, they were to recover according to the sum stipulated in the contract. And that no abatement was to be made on account of any contingencies to which they might have been exposed, if they had been allowed to go on the voyage originally contracted for.

In fine, the cases taken together seem irresistibly to lead to the conclusion, that if the person to whom the service is to be rendered prevents the performance of it, he must pay as if it were done. In this case *Donnell* had a right to change the voyage; he did change it; and *Pawson* was bound to obey, and he did obey. *Donnell*, therefore, prevented *Pawson* from performing the service, and must pay as if it had been performed. The party who is not in fault is not bound to give up any part of the compensation, contracted to be given. It belongs to him by the agreement, and the law will not enable the other party to deprive him of it without his consent.

Wirt, for *Donnell.*

The first subject to which the attention of the court is invited, is the claim for the alleged loss of the privilege from *Canton*, which is the subject of the 2d, 6th and 9th bills of exceptions, on the part of the appellant. This is one of those things which it was not supposed possible for human ingenuity to bewilder with a moment's doubt, until the defendants' *second* prayer was refused, and the instruction was given which produced the appellant's 6th and 9th prayers. *Graham*, the administrator of *Pawson*, is obviously a man of business, as appears by the record, and it had not entered into his imagination to make this claim. His letter to *Donnell* will be found in the record, and his account stated. By his letter it will be seen that he manifestly considered the privilege from *Coquimbo* as substituted for that originally stipulated from *Canton* or *Batavia;* and he claimed nothing more for *Pawson* than the right to bring the same weight, 25,000 lbs. from *Coquimbo*, which he was originally authorised to have brought from *Canton* or *Batavia.* "You will observe," says he, in that letter, "that Captain *Pawson's* privilege in the ship was not taken by *several thousand pounds weight;* of course, you will allow for the deficiency *as you have done before.*" It is not the value of the *Canton* privilege in *Canton* goods, which he proposes to estimate and claim; but simply the *weight* which he considered *Pawson* authorised to bring from *Coquimbo*, and which, not having been wholly brought, he claims an allowance for the deficiency. Turn to his account on the next page, and you will perceive that there is entered at the foot of the account, in the left hand column, *Graham's* estimate of this deficiency, to wit, $255 52, under the description of "loss of privilege," and this thrown in among several articles, by way of make-weight, after the account had been formally signed and closed, and consequently not presented as articles on which he meant peremptorily to insist. Besides, if *Graham*, with his knowledge of commercial usage, had considered the *Canton* privilege as a subsisting privilege, he would have charged that privilege at its full value, and we should find on the other side a credit for the freight of *Pawson's* copper and other goods from *Coquimbo.* That freight was the inevitable consequence of treating the *Canton* privilege as a subsisting claim; for Captain *Pawson* surely could not have two privileges subsisting in the same ship at the same time; an *actual* privilege from *Coquimbo*, and an *ideal* one from *Canton*, charged at its highest speculative value. The total absence of any credit for the freight of *Pawson's* goods from *Coquimbo*, and of any charge for this *Canton* privilege, *as a Canton privilege*, by *Graham*, and the total absence of any charge for the freight of *Pawson's* goods by the *Chesapeake*, in *Donnell's* account, all go to prove that this vision of a subsisting privilege, in a non-subsisting voyage, had never entered the heads of these *practical* men. It was left for the ingenuity of our learned friends, on the other side, to start this *chimera*, and it did not occur even to them to start it, till their imaginations had been heated and ignited by the collisions of the trial. The court will find the proof of this fact in the account; where it will be found that, after *Graham* had closed and signed his account, under his signature, in the right hand column, there are three entries headed "*claim, as set up in court*, viz." and then assuming the balance as it had been struck by *Graham*, $5,552 97, they add to it for drip stones and duties saved, $48 06, and then, for the first time, this *Canton* privilege makes its appearance under the title of "Loss of *Canton* privilege, $3,050!" in lieu of the $255 52, which *Graham* had entered at the foot of the opposite column, on account of the *deficiency of weight*, merely from *Coquimbo*. Nor had our learned friends the grace even to throw into the opposite scale the freight of *Pawson's* goods from *Coquimbo;* but they claim both the privilege of *supposititious* goods, on a *supposititious* voyage, and the privilege of *actual* goods on an *actual* voyage; and thus, according to their statement of the account, *Pawson* gets the benefit of a double investment of the same capital; that is to say, he gets the freight of an *imaginary Canton* cargo, in which his capital *might* have been invested if the ship had gone there; and also the freight of the goods in which that capital was *actually* invested at *Coquimbo:* the learned counsel, seeming to suppose, that as they had a fat pigeon to pluck, it was not necessary to be at all scrupulous as to the extent of the depredation. The court, however, not being disposed to "go the whole" length, instruct the jury, that if they allow the plaintiff the *Canton* privilege, they must allow the defendant the freight on *Pawson's* adventure from *Coquimbo*. After such a manifestation of the *grasp-all* disposition on their own part, it does not seem to be with the best of all possible graces that the learned counsel on the other side complains of *the spirit which concocted Donnell's* statement of the account. But waiving this interchange of courtesies, let us proceed from this view of the origin of this *Canton* claim, to the consideration of its nature.

It is proper to observe, in the first place, that this is not an insulated contract for an insulated voyage. This is not *Pawson's* first and only connexion with *Donnell.* It appears by *Graham's* letter, that he had been previously in his employment, for in refusing to admit the freight for the cordage, he reasons upon *Donnell's* own construction of the captain's privilege in a previous voyage which had been performed for him by *Pawson in* 1816. It is the case, then, of a sea captain, looking to a permanent and profitable connexion, in the line of his business, with an opulent and enterprising merchant. This fact should be borne in mind.

It is essential to the successful pursuit of commerce, that the merchant should have the uncontrolled privilege of planning and altering his enterprizes at pleasure. In all his operations he is governed by the intelligence which he is continually receiving, of the state of the markets abroad; and as these markets are always fluctuating, it is an every day's occurrence to see a complex voyage, which had contemplated several ports, varied and remodified in the course of its progress, at the pleasure of the merchant for whose benefit it is made. Those who enter a merchant's employment, enter it with full knowledge of his sovereign power over the destination of his ship. The captain knows that he is bound to obey the owner's instructions, without asking for a reason. He knows, that with regard to his owner "*sic volo, sic jubeo, stet pro ratione voluntas,*" is reason enough, and that he the captain has nothing to do but to obey. With regard to any little adventure which the captain is permitted to have on board, and to carry, free of freight, it is a mere dependant on the great enterprizes of the merchant. The overruling object of the voyage is the profit of the owner. The captain avails himself of the owner's experience, skill and knowledge, in seeking the most profitable ports, to make his own small investments at the same ports. He knows very well that the voyage is not made on his account, but on the sole account of his owner. He is not the charterer of the ship. His *instructions* are not *charter parties* and *contracts of affreightment*, in which light they seem to be erroneously viewed on the other side. The privilege accorded to him is a mere dependant privilege following the fortunes of the larger adventure as obsequiously as the cock-boat follows the ship to which she is lashed, and to which she belongs; and the cock-boat might just as rationally complain that the ship had changed her course, as the captain complain that the owner had changed the destination of the voyage; because the captain enters the service with full knowledge that this power of change is perfectly arbitrary on the part of the owner. With regard to his own small venture, he knows that it will be generally true, that what is most profitable for his owner will be most profitable for himself; that if, for example, the market of *Baltimore* was already glutted with *Canton* goods, so that *his owner* had no longer a hope of a profit on *Canton* goods at that market, neither could *he* hope for a profit on the same kind of goods in the same market; and even when it is otherwise, and the captain would prefer for his own interest, that the original destination had not been changed, he knows that he is to find his indemnity for any petty temporary loss, in the permanency of his connexion with a rich and bold and skilful adventurer, whose prosperity had already shewn how well he could play at the game of commerce; and that if *he* should lose to-day by the change of a voyage, he would gain a hundred fold in the long run by the permanency of the connexion. The captain's object is to be permitted to wield his little capital at the ports which he visits for his owner, and to carry his goods free of freight in the owner's ship. There is no *stipulation* on the part of the owner, that his ship *shall* visit such and such ports. If there were such a *stipulation*, *Pawson*, if he had lived, might have maintained an action for damages against *Donnell* for not having sent the ship to *Canton*. But this, surely, cannot be pretended. Nay, it is conceded that *Donnell* had the right to change the destination of the ship at pleasure: and this concession is utterly inconsistent with the idea of a *stipulation* with *Pawson*, that the ship should go to *Canton;* for if there were such a stipulation, *Donnell* had no right to violate it, no man having *a right* to violate the *rights* of another. Now, if the original plan of the voyage by *Canton* did not amount to a *stipulation* that the ship should go to that port, and consequently gave *Pawson* no right to sue for damages, the opinion of the court below is wrong, for this is the very thing which they permit *Pawson* virtually to do; for they permit him to claim damages for the loss of the *Canton* privilege on the ground of his title to it by stipulation. They allow him to prove what such a privilege *from Canton* would have been worth in that year, and to recover the amount so proved in the form of damages; an opinion which cannot possibly be right, except on the postulate that *Donnell* had no right to alter the original voyage by reason of this stipulated privilege with the captain. But it is conceded that the owner has the sovereign right to change the voyage at pleasure—and if he has a right to do so, he surely cannot be made to answer for it as wrong.

On our side, we admit that the captain is entitled to his privilege by force of the stipulation; that is, he is entitled by the stipulation to bring home twenty-five tons by admeasurement, or 25,000 lbs. by weight, of goods, in *Donnell's* ship, free of freight. This is the substance and the whole effect of the stipulation according to the law and usage of merchants. The error of the opposite opinion arises from considering *Donnell* as under a stipulation to send the ship to *Canton*, or to answer the captain in damages if he fails to do so. But such a construction would lay a burthen upon commerce, which would not only embarrass it in the extreme, but destroy it altogether. A merchant could never change the original plan of his voyage, without meeting an action for damages by the master, at every step; and if the voyage be a trading voyage, consisting of many parts, it is easy to perceive that the owner is altogether at the mercy of his captain, and the direction of the voyage taken out of the owner's hands and placed in those of his servant; a perversion of all commercial ideas so monstrous, that the opinion which leads to it cannot be right. That the owner has a right to change the course of the voyage at pleasure, is one of the first axioms in commercial operations, and it has been necessarily conceded on the other side. The inevitable consequence of which is, that the privilege of the captain is *ambulatory and contingent, as to the port* from which it shall be taken. It depends upon the owner's pleasure, and is known on all hands to depend on his pleasure in directing the movements of the ship. The substance of the stipulation is, that the captain shall carry so much free of freight; but from what port he shall carry it depends on the ultimate pleasure of the owner, and grows *necessarily* out of his sovereign control over the voyage. Hence, when an owner in the outset, plans a complicated voyage, consisting of many parts, and gives the captain a privilege *e. g.* of twenty-five tons from the last named foreign port, it is always taken as subject to the condition that the plan of the voyage shall not be changed by the owner, or that if it shall be changed, the captain shall have his equivalent in the same number of tons from whatever port shall, under such change of voyage, become the port of departure for the home port. Such, it is manifest, was the understanding of *Donnell*, of *Pawson* and of *Graham*, and it may be with confidence averred, that such is the understanding of all commercial men. It cannot be otherwise without placing commerce under a load of embarrassments, which would long since have crushed and destroyed it.

If this view of the subject be sound, as it is confidently believed to be, the consent of *Pawson* to the change of the voyage, is wholly immaterial. The privilege, *as a privilege from Canton*, fell, when the owner, in the just exercise of his authority, struck out that port from the plan of the voyage. Being, from its nature, dependant entirely on the condition of the ship's going to that port, there was an end to it as soon as the owner determined that the ship should not go to that port; and, however the question was put to the court, the court erred in the positive instruction which they gave to the jury, that this claim depended on the question, whether *Pawson* had, with a full knowledge of his legal rights, waived this privilege, and consented to the change of the voyage. They were wrong in treating as a reality and a substance what had never been more than a mere shadow, and which had ceased to be even a shadow after the change of the voyage on which it depended, and they were wrong in making the extermination of that voyage to depend, in any degree, on *Pawson's* consent, because its extermination was an act within the sole and perfect competency of the owner alone, and entirely independent of *Pawson's* consent, or refusal.

But suppose, for the sake of the argument, *Pawson's* consent to the change of the voyage to have been necessary to put an end to this privilege from *Canton;* it is respectfully submitted, that that consent is as expressly given as consent in such a case can be given. Not only is it in proof, and *that in writing*, that he cheerfully acceded to the proposed change of the voyage, but that he recognized the transfer of his privilege from *Canton* to *Coquimbo*, and proposed to send home the proceeds of his little capital from *Coquimbo*, *not on the footing of freight*, but *on the footing of his privilege.*

Donnell, in his letter of 26 Dec. 1819 to *Pawson*, after stating that mature reflection had satisfied him that a *Canton* cargo could not be realized in *Baltimore*, proceeds thus—"I therefore revoke and countermand the orders I gave you to proceed from *Chili* to *Canton*, and now substitute, that you will return with the ship and cargo of copper direct from the coast of *Chili* to *Baltimore*." He then proceeds immediately to the subject of the captain's privilege, in these words—"As relates to the disposal and investment of your own funds, you must use your own discretion by investing it in copper, or any thing else, and bringing it with you in the ship—the copper may, (as I hope it will,) be bought on terms that will, with my funds and yours, load the ship very deep, but if necessary you must load her very deep. Should you fail in getting copper on the coast of *Chili*, you will immediately, on finding it so, proceed from thence to *Samarang*, in the island of *Java*, and there invest my funds, and your own, in coffee, (no other article of the produce of the island will answer,) and proceed from thence direct to *Baltimore*. The government of *Batavia* may object to your loading at *Samarang*, being an out port, but you must use every means in your power to obtain from the government a permission, as you will be able to put on board coffee at *Samarang*, two or three dollars per picol less than at *Batavia*."

As explanatory of this letter, it is proper to call the court's attention to the description of the captain's privilege, as it stood in the voyage first planned. It will be found at the close of *Donnell's* letter of the 18th of November, 1819, and is in these words: "To prevent misunderstanding I deem it necessary to state your compensation to be two thousand dollars, payable on your return, with a privilege from *Canton* not to exceed twenty-five tons, but it is understood that you are not to put any copper or heavy article on board at *Chili*, as my views are that you completely load her there with copper, and that only for my account." In his postscript to this letter of the 18th Nov. 1819, *Donnell* anticipates the possibility of being disappointed in procuring copper at *Chili*, and in that event gives a similar direction with that in the letter of the 26th Dec. as to proceeding to *Batavia* for a cargo of coffee, and thence direct to *Baltimore;* so that in the original plan of the voyage, *Canton* was not contemplated as a port to which the ship would *certainly* proceed: for in the owner's views of the subject at that time it was made to depend on the contingency of being able to get a cargo of copper at *Chili*. And we find him shifting the captain's privilege at pleasure from *Canton* to *Batavia*, and from *Canton* goods to *Java* coffee, at pleasure, in the full exercise of his clearly understood rights as owner. So in his letter of the 26th Dec. when he had determined that the ship should not visit *Canton*, he provides for the captain's privilege by taking off the interdict as to his putting copper, or other heavy articles on board at *Chili;* and authorises him to bring home his funds in copper, or any thing else he pleases; or if by failing to get a cargo of copper at *Chili*, he finds it necessary to go to *Java*, to bring home his funds in coffee. It is hence very manifest what *Donnell's* understanding of his rights as owner were. What says *Pawson* to this change of voyage? In his letter of Feb. 7, 1820, from *London*, he says—"I have had the pleasure to receive your letter of the 26th Dec. in which you are pleased to alter the original intention of the voyage, which will be *cheerfully and strictly attended to*, and if on my arrival at *Chili*, I shall find it necessary to proceed to the island of *Java*, no exertions shall be wanting to have your wishes fulfilled in getting the cargo of coffee only at *Samarang*." Again, to shew *Pawson's* distinct understanding that his original privilege from *Canton* or *Batavia* was now transferred to *Coquimbo*, he says in his letter from that place of Sept. 4, 1820, "as I may possibly not have another opportunity, direct to the *United States* shortly, I would thank you when you make insurance on the ship and cargo, also to insure for my account the same sum which you did me the favour to insure from *London* here. I think it probable it will be shipped in silver bullion and copper." And again, still more explicitly, in his letter of 4th Nov. 1820, from *Coquimbo*, he says, "In my former letters I requested you to insure for my account the sum of $5,000. I now have to request you will insure $1,000 more. If I find the ship too heavy laden with your copper, I shall curtail *my privilege in that article*, and bring my funds in silver." If this be not a consent, a free, voluntary, *cheerful* consent, to take his *privilege* from *Coquimbo* in lieu of that from *Canton* or *Batavia* according to the original voyage, language has lost its meaning, and discussion is idle and delusive.

It is insisted, on the other side, that this was not a question for the court, but a question for the jury. Why? Because it is said it is a question which did not depend on letters alone, but was to be inferred from the whole correspondence, *and the acts of the parties taken together*, and so is exactly like the cases of *Laidlow vs. Organ*, 2 *Wheaton*, 183, and *Etting vs. Bank of the United States*, 11 *Wheaton*, 75. But it is not so; for it is a question arising *upon the letters alone*. We do not rely upon a *single act* of either the parties to aid our construction of the letters. We say, that upon the face of *the letters alone* there is a clear and *cheerful* consent on the part of *Pawson* to the change of the voyage, and the substitution of the privilege from *Coquimbo*, in lieu of that contemplated in the original voyage. How are these letters to be construed? Not by the technical rigour which is applied to special pleading, or to the old common law conveyances. They are letters written by commercial men, in a course of business, and are to be construed with the freedom and candour which are always applied to such a correspondence, and so construed there cannot be a rational doubt that *Pawson* freely and cheerfully adopted the substituted voyage and privilege. The court's attention is particularly invited to the declaration in his last letter, that if he should find the ship too heavy laden with *Donnell's* copper, he would curtail his *privilege in that article*, and bring home his funds in silver. His privilege in what article? *in copper.* From where? from *Coquimbo.* Did he mean that he would curtail his privilege from *Canton* in copper? Did he even propose to bring home copper from *Canton*? Once more, did *Pawson* expect to pay *freight* for the copper which he was about to bring home from *Coquimbo?* For the court have said, and justly said, that if he meant to rely on his privilege from *Canton*, he was bound to pay freight on his goods from *Coquimbo*? Did he expect that he was to pay such freight when he himself expressly declares that he was going to bring it home in part of his *privilege*, and the rest of his funds, if necessary, in silver.

It is unnecessary to pursue so palpable a proposition any further. It must be manifest to the court, that *Pawson* knew that *Donnell* had merely exercised his proper rights in changing the voyage; that *Pawson* acceded to this change willingly and cheerfully, and perfectly understood that in consequence of that change, and as a necessary part of it, his privilege from *Canton* to *Batavia*, according to the original voyage, was now commuted for the same privilege of twenty-five tons from *Coquimbo.* And as all this appears *upon the letters alone*, it was a question solely *for the court*, under the authority of *Macheath vs. Haldimand*, 1 *T. R.* 172, 180, and *Ferries vs. Walsh*, 5 *Harr. & Johns.* 308.

But the court below instructed the jury, that the right to set up this claim of damages for the loss of the *Canton* privilege, not only depended on the question, whether *Pawson* had agreed to waive that privilege, and accept in lieu of it the privilege from *Coquimbo*, but on the further question, whether he made such waiver and acceptance *with a knowledge of his legal rights.*

In this last qualification of the instruction it is conceived that there is a double error. 1. In supposing that *Pawson* had a right to object to the change of the voyage, or to insist on this privilege, as a subsisting privilege from *Canton*, after the voyage had been changed by the authority of the owner. 2. In putting it to the jury to say, whether such waiver and acceptance were made with a knowledge of his legal rights, when there was not an atom of testimony in the cause, to draw that knowledge into question. Every man is presumed to be conusant of his legal rights till the contrary appears. The evidence every where exhibits *Pawson* as a man of superior intelligence. All his letters and all his actions, are those of a scholar, and a man of judgment and endowments far above the great mass of those who are engaged in similar pursuits, nor is there one *scintilla* of proof in the whole record tending in the slightest degree to impeach his capacity. And yet it is in this case that the court, *sua sponte*, raise, for the consideration of the jury, the question, whether *Pawson* acted with a knowledge of his legal rights. The Court of Appeals, in the case of *Davis vs. Davis*, 7 *Harr. & Johns.* 36, took the case out of the hands of the jury on the ground, that although there was some evidence in the cause, it was not such evidence as ought to satisfy a reasonable man of the truth of the proposition. The court of *Baltimore* county, reversing this rule, refuse to decide a proposition which properly belongs to them as a court, (the construction of the letters) and hand over the whole subject to the jury, on the ground that the proposition submitted to them depended on another proposition which belonged peculiarly to the jury, to wit, whether *Pawson* acted with a knowledge of his legal rights, when there was *no evidence* in the case which had a tendency to raise this latter question. Thus it is a question gratuitously raised, without a tittle of evidence to prompt it, and which, thus raised, is supposed to excuse the court for refusing to decide on the construction of the letters, whereas the truth is, that if the question had really been called for by the evidence, the court

court on the part of the appellant. Relying on those arguments and authorities, and claiming the full benefit of them, it is intended to confine the further argument to two questions—

1. Whether the contract was not an entire one, and the whole compensation, therefore, lost by the death of *Pawson* at *Coquimbo* before he had completed the contract.

2. Whether if *Pawson's* representatives are entitled to recover a rateable portion of that compensation, the court did not err in the *termini* which they gave to the jury for the ascertainment of the *ratio* of compensation.

1. This question arises on the appellant's *fifth* prayer, which presents the single point of the entirety of the contract, and its defeat by the death of *Pawson* at *Coquimbo* before its completion.

Natural justice, it may be admitted, would seem to require that every contract for labour should be considered as divisible and apportionable, and where a party has been prevented by causes over which he has no control, from completing his engagements, he should be paid for so much of them as he has faithfully performed. The law, however, leaves it to the parties to make their own contracts; and wherever they have made *an express* contract the law never interferes to vary that contract upon any notion of natural justice. There is, perhaps, no class of contracts which more strikingly illustrates the truth of this principle than the contract for rent. A rents of B, a storehouse on a wharf in town, and stipulates expressly to pay him so much rent at the end of the quarter or year. The house is burnt down the next day, and the tenant has no use of the property at all; yet he must pay the rent. A whole wharf was consumed in *Norfolk* by the great fire of February, 1804. The houses which covered that wharf, (*Campbell's* wharf,) were wholly in the hands of tenants. These tenants, with their families, were all unhoused in the severest part of the winter, and many of them lost their goods, as well as their houses. The extent of the calamity excited universal sympathy. They were unable to repair; the misfortune was one beyond their control. They had lost the enjoyment of that for which alone they had stipulated to pay the rent. The landlord was a minor; and his guardian was the late Judge *Tucker*, who considered himself bound to act according to law. The tenants insisted on an abatement of the rent. Natural justice seemed to require it. But the law was clear. Their contracts were *express;* and for that reason alone they were held bound to pay the rent. In the course of the investigation a case was cited from *Aleyn's Reports*, where a tenant had been dispossessed, and held out by a hostile invasion of the kingdom. Yet he was held bound to pay the rent by force of his express contract. That was a case in which natural justice seemed to forbid the demand; but all considerations of natural justice were silenced by the express contract of the parties, and the unwillingness of the law to interfere with those contracts.

It is on this ground that it has become a principle of law in the construction and enforcement of contracts, that "unless there be some express stipulation to the contrary, whenever *an entire* sum is to be paid for the *entire work*, the performance or service is a condition precedent; being *one consideration* and *one debt*, it *cannot be divided*." These are the words of *Starkie* in his 3d volume, 1765; and he adds "this holds equally, whether a specific price has been agreed on or not. It is universally incumbent on the plaintiff to prove performance." In the *American* edition of *Starkie* the court will find under note (k,) and note (1,) to the above cited page, a collection of *British* and *American* decisions, all going to illustrate and fortify the position, that a contract *made entire* by the parties, *cannot be divided by the court*, and several of those, it is believed, at least as strong, if not stronger, than the case now under consideration.

Thus in the modern case of *Ellis vs. Hamlen*, 3 *Taunt.* 52—"It was held that a builder who undertook a work of special dimensions and materials, and deviated from the specification, could not recover on a *quantum valebant* for the work, labour and materials."

In *The Countess of Plymouth vs. Throgmorton*, 1 *Salk.* 65, the defendant's testator had appointed the plaintiff to receive court on the part of the appellant. Relying on those arguments and authorities, and claiming the full benefit of them, it is intended to confine the further argument to two questions—

1. Whether the contract was not an entire one, and the whole compensation, therefore, lost by the death of *Pawson* at *Coquimbo* before he had completed the contract.

2. Whether if *Pawson's* representatives are entitled to recover a rateable portion of that compensation, the court did not err in the *termini* which they gave to the jury for the ascertainment of the *ratio* of compensation.

1. This question arises on the appellant's *fifth* prayer, which presents the single point of the entirety of the contract, and its defeat by the death of *Pawson* at *Coquimbo* before its completion.

Natural justice, it may be admitted, would seem to require that every contract for labour should be considered as divisible and apportionable, and where a party has been prevented by causes over which he has no control, from completing his engagements, he should be paid for so much of them as he has faithfully performed. The law, however, leaves it to the parties to make their own contracts; and wherever they have made *an express* contract the law never interferes to vary that contract upon any notion of natural justice. There is, perhaps, no class of contracts which more strikingly illustrates the truth of this principle than the contract for rent. A rents of B, a storehouse on a wharf in town, and stipulates expressly to pay him so much rent at the end of the quarter or year. The house is burnt down the next day, and the tenant has no use of the property at all; yet he must pay the rent. A whole wharf was consumed in *Norfolk* by the great fire of February, 1804. The houses which covered that wharf, (*Campbell's* wharf,) were wholly in the hands of tenants. These tenants, with their families, were all unhoused in the severest part of the winter, and many of them lost their goods, as well as their houses. The extent of the calamity excited universal sympathy. They were unable to repair; the misfortune was one beyond their control. They had lost the enjoyment of that for which alone they had stipulated to pay the rent. The landlord was a minor; and his guardian was the late Judge *Tucker*, who considered himself bound to act according to law. The tenants insisted on an abatement of the rent. Natural justice seemed to require it. But the law was clear. Their contracts were *express;* and for that reason alone they were held bound to pay the rent. In the course of the investigation a case was cited from *Aleyn's Reports*, where a tenant had been dispossessed, and held out by a hostile invasion of the kingdom. Yet he was held bound to pay the rent by force of his express contract. That was a case in which natural justice seemed to forbid the demand; but all considerations of natural justice were silenced by the express contract of the parties, and the unwillingness of the law to interfere with those contracts.

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In *The Countess of Plymouth vs. Throgmorton*, 1 *Salk.* 65, the defendant's testator had appointed the plaintiff to receive his rents, and promised to pay £100 a year for the service, and the *testator died after the plaintiff had served him for three quarters of a year*, and the court held, that *the contract being entire could not be divided.* In *Cutter vs. Powell*, 6 *T. R.* 326, where the employer engaged in writing to pay a sailor the sum of thirty guineas, provided he proceeded and continued and did his duty on board for the voyage, and before the end of the voyage the sailor died, it was held that the contract was entire, and that as the service, which was a condition precedent, had not been performed, nothing could be recovered.

Is it or is it not to be considered as a principle of law, that where an entire compensation is stipulated to be paid for an entire service, the whole service must be performed as a condition precedent to the demand, and that there can be no division or apportionment of the payment for a part performance of the service? It seems impossible to deny it. Nor will it do to speak of this principle as antiquated and obsolete: for it is traced through the *British* books down to *Starkie*, one of the most recent and authoritative writers, who has engrafted the principle on his text as an existing and solid principle of the *English* law; and the host of cases quoted by the *American* editor, shows how extensively the principle has been recognized and acted upon in the *United States.*

It is indeed admitted by the learned counsel on the other side, "that if from the words of the contract it appears that the parties intended that the entire performance should be a condition precedent to the payment of any part of the compensation, then such condition, like every other condition precedent, must be strictly and entirely performed. For the parties have a right to contract as they please. But in order to produce this result, it must clearly appear from the words of the contract that such was the intention of the parties; and such was the case of *Cutter vs. Powell.* The same principle prevails in commercial contracts.

This admission is taken in the terms in which it is stated, (and it is correctly stated) and we are willing that this case shall be tested by it. It must clearly appear from the words of the contract, that it was the intention of the parties, that the entire performance should be a condition precedent to the payment of any part of the compensation. But when does the law hold such intention clearly to appear from the words of the contract? Let *Starkie* answer the question—"*whenever an entire compensation is to be paid for the entire work, the performance or service is a condition precedent, being one consideration and one debt, it cannot be divided*"—"*unless there be some express stipulation to the contrary.*" The law then considers this intention of the parties that the entire performance shall be a condition precedent to the payment of any part of the compensation, as *always clearly appearing from the words of the contract, where an entire compensation is to be paid for the entire work, unless there be some express stipulation to the contrary.* Such is the *legal construction* of such a contract; and such will be its fixed and final construction, unless there shall be some evidence of a general and known usage acting upon such contracts to vary its construction. In the case of *Cutter vs. Powell*, the court, after stating the construction of the instrument upon its face, admitted that it would be modified by proof of a general usage acting upon such contracts, to make them divisible; and they stayed the ultimate judgment to let in such proof if it could be adduced, feeling manifestly all the unwillingness to enforce the legal construction of the instrument which can be possibly felt in the case at bar, if parol proof of such a usage could be adduced. But it appears by the original report of the case that no such usage could be adduced, and the instrument necessarily had its legal effect.

It will be understood as admitted by us, that *general usage*, or, what is the same thing, a *general understanding* in the community, founded on such usage, will control the construction of these contracts, and render divisible and apportionable a contract which upon its face would be indivisible according to the foregoing rule. An instance of this is put by *Lawrence*, Justice, in *Cutter* and *Powell:* for he said "that a *common servant*, although hired in a general way, was to be considered as hired with *reference to the general understanding upon the subject*, that the servant shall be entitled to his wages for the time he served, though he do not continue in the service for a year." Here he puts the course of decision upon the *general understanding*, founded, manifestly, on the general and known usage, which usage always enters into the contract as a part of the contract. And he confines the remark to *common servants*, by which he is understood by the annotator to *Starkie*, to mean *domestic servants:* for there is no usage or understanding, it would seem, as to *servants in husbandry*, with regard to whom, therefore, the contract takes its legal and natural effect of throwing on the servant proof of the performance of the whole service, as a condition precedent to his right to demand compensation. Hence, in the case of *The King vs. Whittlebury*, 6 *T. R.* 467, the same Justice, *Lawrence*, observed "that nothing could be due to the servant, (who was it seems a servant in husbandry) till the completion of the year, or the end of the service." The same principle was decided by Lord *Ellenborough*, as to a servant in husbandry, in the case of *Spain vs. Arnott*, 2 *Starkie's* cases, 265. The learned counsel, on the other side, seems to suppose that these cases decide nothing but as to the time of bringing the action; that is, that the action, for the part of the wages due, cannot be brought till the end of the year. On the contrary, they are understood by us as being decided on the very principle now under discussion, to wit, that the entire performance of the contract is a condition precedent to the demand of compensation, and the whole wages are forfeited by the failure of any part of the performance. *Comyns*, in his Digest, tit. *Justices of the Peace*, (B 63,) says "if a servant depart from his service he shall lose his whole wages"—for which he cites *Bro.* tit. *Labourer*, 40, and the same law is laid down from *Dalton's* Justice, in the note already cited from *Starkie.* Contracts with mariners are subject, it is presumed, to the same law of usage, thus modifying the terms of a contract, which would otherwise be considered as a condition precedent, as is manifest would have been done in the case of *Cutter vs. Powell*, if any such usage could have been shewn. And on the same footing of usage and general understanding rests, it is presumed, the construction of contracts for the hire of slaves in this State, if indeed the law has been ever so judicially settled, for which, however, no decision is quoted. In *England* we have seen it would be otherwise as to servants hired for the purposes of husbandry.

On this review of the authorities it may be fairly considered as established, that wherever an entire sum is stipulated to be paid for an entire service, the contract is indivisible, and the performance of the entire service becomes a condition precedent to the demand of any portion of the compensation, unless, in the language of *Starkie*, there be some *positive stipulation to the contrary*, or unless there be some *general understanding or usage in regard to such contracts* that they shall be apportioned. Now with regard to *a positive stipulation to the contrary*, none such can be pretended in this case; and with regard to *usage or general understanding*, none such can be pretended to have been shewn or to exist in regard to contracts like this with a *supercargo*. And it will not do to borrow such usage or understanding from other classes of contracts and apply them to this; to say for example that, in given cases, the contracts of mariners of domestic servants in *England*, and hired slaves in this State, have been apportioned; and then claim the analogy as applying to this contract. If this were allowable the case of *Cutter vs. Powell* would never have been decided, for there the analogy was close and at hand. The contract in that case was the contract of a mariner, and it would not have been denied that the *common* contracts of mariners were in some cases apportionable; but this analogy, close as it was, as belonging to the same class of characters and the same description of services, was not permitted to be applied to the specific description of contracts before the court, but the court called for proof of the usage as bearing on *that particular form and species of contracts*. So, if the analogies now offered would have sufficed, the acknowledged usage to apportion the contracts of *domestic* servants would have been permitted to be brought to bear on the contracts for servants *for the purpose of husbandry*. But it was not permitted, and the impassable line of demarcation between mariners under those two forms of contract, and servants under those different species of engagement, proves that in that country at least the courts are not disposed to indulge in this loose transfer of usage and understanding from one class of contracts to another. For it is manifest to these courts, and must be obvious to every one who will look steadily at the subject, that if in answer to the principle of law which has been conceded with regard to the entirety of a contract, it be enough to say and to show that *some contracts* entire in form are apportionable by force of usage, the principle is no longer of any value; nay it has no longer an existence; it is virtually exploded, if such an answer will suffice because the same answer may be given to every objection founded on the entirety of a contract. If this principle with regard to the entirety of a contract, which grows entirely out of respect to the intention of the contracting parties, and their sovereign right to bargain as they please, be immoral or pernicious, and it is thought better that courts should not only expound but make bargains for their fellow-citizens, let the matter be avowed openly and above board, and let the *English* principle be publicly exploded. But let us not profess to admit and respect the principle in terms, while we explode it in practice, and render it virtually a nullity.

This, then, be it remembered, is a contract *with a supercargo*, as to which species of contract there is no proof in the cause of the existence of any usage or understanding explanatory of the contract. It is a contract, then, the construction of which depends solely upon its own terms, and the only remaining question would seem to be, is it a contract in which an *entire compensation* is stipulated to be paid for an *entire service?* This question can only be answered by referring to the letters of *Donnell*, which state the whole contract, both the service and the compensation. The letter of the 18th November, 1819, chalks out the whole service in detail. It is a minute specification of the duties which *Pawson* was to perform; carries him around the whole voyage; and after this specification of the services, concludes thus—"to prevent misunderstanding I deem it necessary to state your compensation to be $2,000, *payable on your return.*" Nothing seems to be clearer than that this is *one entire* compensation stipulated for the *entire service.* It is not *at the rate* of $2,000; but the sum of $2,000, *in solido*, *payable on Pawson's return*, and clearly payable for the *entire service.* If there be any truth in the principle therefore, or any case to which it is to be permitted to apply, this is such a case, unless there be some positive stipulation to the contrary, which is not and cannot be pretended, or some proof of usage and understanding to the contrary applicable to contracts in this form with *supercargoes*, which can be as little pretended.

In opposition to this view of the subject, it is intimated rather than directly averred in the opposing argument, that this principle rests on ancient decisions. For the learned counsel, after having quoted Sergeant *Williams*' note (4,) to *Pordage vs. Cole*, 1 *Saund.* 320, and 2 *Starkie's Ev.* 643-4, and note (*n*,) proceeds with the following inference from those authorities: "Whatever, therefore, may have been the ancient decisions upon this subject, it has for many years been settled in the English courts that in ordinary contracts, with or without seal, the defendant, according to the principles of the common law, is liable in proportion to the benefit derived from the contract, although he may not have received the whole consideration for which he stipulated, provided the plaintiff is not in fault, and does not possess the power to perform the whole stipulation. This is the general rule applicable to all contracts. It is, however, admitted, that if, from the words of the contract, it appears that the parties intended that the entire performance should be a condition precedent to the payment of any part of the compensation, then such condition, like every other condition precedent, must be strictly and entirely performed." So that the learned counsel would seem to give the rule, as he would have it, to be the *general* rule and the *modern* rule; and the principle on which we insist, as an exception from that general rule, resting only on ancient decisions, (one of which, that in the case of the *Countess of Plymouth vs. Throgmorton*, *Salkeld* 65, he seems to think was misunderstood by the court of King's Bench,) and deserving very little quarter on the score of morality. There is certainly no want of professional address in this mode of presenting the subject. But we apprehend, that when the authorities relied on to maintain this view of the case shall come to be examined, it will be found that these two rules of law, instead of maintaining the relation of a general rule and an exception, are two separate and independent rules relating to different classes of cases, and each, in its respective sphere of action, equal in generality and dignity to the other. Let us make this examination of these authorities as briefly as possible.

The first of them, as cited on the other side, is *Pordage vs. Cole*, 1 *Saunders' Reports*, 320, (*n.* 4.) On turning to this note it will be found that the whole business of the note was to shew in the first place the artificial and subtle distinctions on which the question of *dependent* and *independent covenants* frequently turned in the old books; and in the next place to offer a few rules by way of test on that obscure and much mooted question of the law. After observing that *covenants*, &c. are to be construed to be either dependent or independent of each other according to the intention and meaning of the parties, and the good sense of the case, and that technical words should give way to such intention, he proposes the following rules for the discovery of such intention, in order to enable the pleader to distinguish when it is necessary in a declaration to aver performance on his own part. These rules are worthy of attention in this case; *first*, because of their analogous bearing; and *secondly*, to enable the court to estimate the value of the passage quoted from this note on the other side. The first rule proposed by Sergeant *Williams*, is this—1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen or *may* happen *before* the thing which is the consideration, is to be performed, the covenants are independent, and an action may be brought for the money, &c. before performance, for it appears that the party relied upon his remedy, and did not make the performance a condition precedent. Sergeant *Williams* then offers his second rule in these words: "But, 2. When a day is appointed for the payment of money, &c. and the day is to happen *after* the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance." The court is requested to apply this rule to the case at bar, and they will see that it is decisive of this question. Sergeant *Williams* proceeds—3. Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. 4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 5. Where two acts are to be done at the *same time*, on the *same day*, neither can maintain an action without shewing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale. This is a skeleton of the whole note, and the court will find by reference to it that each of these five rules is separate and distinct from the rest, embracing separate and distinct classes of cases, and neither of these rules proposed by the author as connected with or at all influencing the decisions of cases falling under any other rule. The learned counsel, not averting to this structure of the note, and the distinct classes into which the cases are thrown under these several and distinct rules, speaks of them thus: "The cases upon this point (of conditions precedent) are collected together and the *rule* laid down in *Pordage vs. Cole*, 1 *Saund.* 320, (*note* 4) as relates to sealed instruments.

"The conclusion *from all the cases* is stated as follows:" and then he gives a quotation, which suits the purpose of his argument, and which he exhibits as Sergeant *Williams*' result from a view of *all the cases touching the subject of conditions precedent*, whereas the learned Sergeant himself declares it to be his conclusion only with regard to *that class* of those cases which falls under his third rule, and which he is treating as entirely separate from those cases which belong to his other rules. That third rule embraces, as we have seen, those cases in which *the covenant goes only to a part of the consideration on both sides, and in which the party who complains of incomplete performance, can redress himself by a cross action for damages on account of that short performance.* After citing several cases *as illustrative of this rule*, the Sergeant proceeds with the words quoted, "Hence it appears, that the reason of the decision, *in these and other similar cases*," (that is, cases in which from the form and nature of the contract the covenant goes only to *a part* of the consideration on both sides, and in which, from the independent character of the covenants, the party may redress himself for the incomplete performance of the covenant on the other side by a cross action,) "besides the inequality of the damages, seems to be, that where a person has received *a part* of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore, the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration." Now, before the learned counsel can have the benefit of this conclusion, he must shew that *this* is one of those cases to which alone Sergeant *Williams* applies this conclusion; that is to say, that it is a case in which, from the form and nature of the contract, the covenant goes only to a *part* of the consideration on both sides. The fallacy of the argument consists in supposing this to be a general conclusion applicable to all sorts of covenants; whereas Sergeant *Williams* limits it expressly to the specific class of cases embraced by his third head; that is to say, to cases where the covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, which he says makes an independent covenant. And having cited all the cases which belonged to this head, and exhausted his own remarks upon it, among which is the passage quoted by the counsel on the other side, he proceeds to his fourth class in these words: "4. But when the mutual covenants go to the *whole* consideration on both sides, they are mutual conditions, and performance must be averred." Now, in applying the general conclusion to the case at bar, the counsel begs the question: for he assumes that this case belongs to the third class, and not to the fourth. Whereas we insist that it belongs to the fourth class to which that general conclusion has no relation; and we prove that it belongs to the fourth class, first by the test prescribed by *Starkie*, that it is an entire consideration stipulated to be paid for an entire service; secondly, by bringing to bear upon it, the test given by Sergeant *Williams* under the second head in his note, to wit: "that a day is appointed for the payment of the money, and the day so appointed is to happen *after* the thing which is the consideration for the money is to be performed;" in which case Sergeant *Williams* adds, "no action can be maintained for the money before performance." The day here appointed for the payment of the money was after *Pawson's* return—*payable on your return*—which was necessarily after all the services had been performed.

We are much deceived, therefore, if this note, instead of operating favourably to the other side, will not, when it is carefully dissected and attended to, be found to operate the other way.

The passage cited from 2 *Starkie*, 643--4, when taken in connexion with the context and with the class of cases of which the author was treating, will be found to have no just relation to this question. *Starkie* is there treating expressly of the action *for goods sold and delivered.* He begins this investigation in page 634, and pursues it down to the passage quoted. In page 640, he says, when the goods which have been delivered do not correspond with the contract, the vendee has a right to repudiate the goods so delivered *in toto*, and if he do so, the vendor cannot recover; but if he choose to keep the inferior goods so delivered, he is considered as adopting them in satisfaction of the contract. He then proceeds, in page 642, to contemplate the case where the contract cannot be rescinded, as where the goods have been used before the inferiority has been discovered; in this case he says the vendor is entitled to recover not the stipulated price; and then comes in the passage quoted on the other side in this connexion—"For *in strictness* the plaintiff who has not performed that which he engaged for, is not entitled to recover at all; if he contracts to build a dwelling-house, he is not entitled to recover for building a stable. But still if the defendant be benefitted to a certain extent, and does not repudiate the contract *in toto*, it seems to be a rule of policy and convenience, as well as of equity and justice, that the plaintiff should be allowed to recover to the extent of the benefit derived by the defendant, and no further, &c." The court perceive, therefore, that the author is here treating of a contract with regard to goods sold, in which the vendee may, if he choose, repudiate the contract, and return the goods; but in which he has chosen to receive and use them. The passage quoted is in application to contracts of that character. But how could *Donnell* repudiate the contract in this case and return the partial services which *Pawson* had rendered. The principle has no *practicable* application to this case. And that it is not of universal application, the case of *Ellis vs. Hamlen*, 3 *Taunt.* 52, proves; where it was decided that a builder who undertook a work of specified dimensions and materials, and deviated from the specification, could not recover on a *quantum valebant* for the work, labour and materials.

The cases cited by the opposite counsel from *Abbot*, *Peter's admiralty decisions*, &c. relate exclusively to *mariners;* and are founded on the laws of *Oleron*, *Wisbuy*, and the *Hanse-towns*, and the ordinance of *Louis* the XIV. This is a class of contracts which stands by itself, and so peculiarly by itself, that we have seen the court of King's Bench, in *Cutter vs. Powell*, refusing to extend the principles and usage of these contracts even to the case of a *mariner* when his contract was in a peculiar form which removed it from the general ground of mariners' contracts. But the case now before the court is not that of a mariner at all; but of a supercargo, whose contract is not to be tested by the principles established by those ancient laws and ordinances in favour of a particular and favoured class of men; but which is to be tested by the general principles applicable to other contracts, which have been already cited.

It is true, as the learned counsel has remarked, on the other side, that in the case of *Cutter vs. Powell*, two of the judges did advert to the circumstance, that the wages were unusually high, as a proof that they were intended to be contingent. But they did not ground their decision on that fact. It is manifest, that they only called it in aid to fortify the construction, which they had given to the contract on its face. And it is equally manifest, that without that circumstance the contract would have received the same construction. The court is, therefore, respectfully requested to compare the terms of that contract with those of the contract in the case at bar; and we are much mistaken if they will not find that the contracts were substantially the same.

The learned counsel on the other side, supposes that Justice *Lawrence* mistook the decision in *Portage vs. Cole*, 1 *Salkeld*, 65. If he did, *Starkie* also mistook it in the note before cited, from his third volume, page 1765-6, where he presents the case as deciding the same point, "that the contract being entire could not be divided." And it is manifest, that *Salkeld* himself mistook it, too, or else his report is entirely delusive and deceptive. And with all the unaffected respect, which I feel for the learned counsel on the other side, I cannot help thinking that Justice *Lawrence*, *Starkie*, and *Salkeld*, having no particular interest to bias their judgment, will be quite as apt to understand correctly the point of an *English* decision, as our learned friend on the other side, whose judgment, without any disrespect to him, may be suspected of not being quite so unbiassed.

The learned counsel seems to think, too, that he has given quite a sufficient answer to the argument drawn from the time of payment of the $2000, to wit, that they were to be payable on *Pawson's* return, by referring to 1 *Powell on Contracts*, 267--8, and to *Abbot on Shipping*, 433, 434, (*note* 1,) and by adding, that "the words in *Donnell's* letter do not create a condition, they are *modal* only, and relate to the manner in which the contract shall be performed."

It is wonderful that this magical word, *modal*, did not occur to the acute and learned Sergeant *Williams*, when he was compiling the note before quoted. We find there, that in utter despite of this cabalistic term, he has erected a whole class of dependant covenants, (the 2d class,) on this circumstance alone, of the time, payment being fixed at a day posterior to that at which the services were to be rendered; which he could never have done, if he had been aware of the omnipotence of this word *modal*.

With regard to *Powell*, he is looking to a very different case from this. He is by no means affirming it as a proposition of universal truth, that time is *never* of the essence of a contract, but is always modal. He is asserting merely, what may be safely admitted, that there are cases in which it is merely modal. "We must carefully distinquish, says he, between conditions annexed to contracts or agreements, and circumstances annexed, which seem to import conditions, but which are modal only; neither suspending, disannulling, nor altering, the obligation of them, but only relating to the manner of performance; as that an agreement shall be performed at a certain day, or in a certain place. And he then puts several cases, by way of illustration, *which have no reference to the mutuality and dependence of covenants*, (*which is the very question here*,) but which regard the construction of a covenant contemplated on one side only, and in which he says, in effect, that the time and place are not of the essence of the contract, but are *modal* only, leaving the essence of the contract untouched. This is quite a familiar principle; but it is one of a very different aspect from that which we are now considering, and which formed the subject of Sergeant *Williams*' note, which is the mutuality or independence of covenants; and where, as we have seen, the fixing a day of payment, subsequent to the time at which the service is to be performed, creates at once a condition precedent with regard to the performance of the service.

The passage cited from *Abbot* is the same on which we have already commented, the case of contracts with mariners, resting on a body of old sea-laws peculiar to themselves, and from which, therefore, no analogy can be fairly brought to bear on contracts with any other description of characters which rest on the general law.

After this review of the law on the subject, it will only remain for the court to say, whether they acknowledge the *English* principle, that where an entire compensation is stipulated for an entire service, the contract is indivisible, and the performance of the whole service becomes a condition precedent to the demand of the compensation.

2. But now admitting, *argumenti gratia*, that this contract is divisible, and the compensation to be apportioned, did the court below assume the proper *termini* of the service to make the apportionment? We say they did not; for that this is a contract with a supercargo, whose duties *begin* and *end* with the voyage, so long as there is a cargo on board. What is a *supercargo?* He is one placed over the cargo as his name imports. He is placed over the cargo, just as the master is placed over the ship. The master represents the owner of the ship; the supercargo represents the owner of the cargo. "From the general nature of the master's employment, *he is a stranger to the cargo, except for the purposes of safe custody and conveyance.*" 2 *Livermore*, 214.

"But when the character of supercargo is superadded upon that of master, (as in this case,) the person in whom these characters are united, stands in the relation of agent to two distinct principals at once. To these principals he owes distinct duties, according to the nature of the business in which they have employed him; for a breach of these duties, he is distinctly responsible to them; and they are separately liable for the injurious consequences of his misconduct in those things which respect his peculiar duties to them." *Ibid.*

The master clothed with these double characters may, in his character of supercargo, do with the cargo what the owner, if present, might do. He may (for example,) as supercargo, accept the cargo at a port short of the port of destination, and the owners of the ship will be entitled to freight. He may, as supercargo, accept and sell the goods *at a port of necessity*, which he could not do as master. 2 *Livermore*, 215, 216.

From the circumstance that the supercargo represents, exclusively, the owner of the cargo, that he has authority over the cargo in all cases of unforeseen emergency, to act for the interest of the owner of the cargo, it is his duty to accompany the cargo, in order to be ready to meet all such emergencies, and take care of the interest of his principals, and consequently, to accompany the cargo to its final port of delivery,

The court below seemed to be of opinion, that as soon as the cargo was purchased, and put on board at *Coquimbo*, and the bills of lading were signed, the duties of the supercargo were at an end, because the transportation and delivery of the cargo at the home port became then the duty of the master of the ship. The master, however, as we have seen, is *a stranger to the cargo*, except for the purpose of safe custody and conveyance. Now, suppose the ship to have been driven into a port of necessity, with a damaged cargo, which made it the interest of the owner to have an immediate sale—the master could not sell it, but the supercargo might. Suppose a case of capture and carrying into port, where the interest of the owner of the cargo might call for negociation, ransom, or sale. The powers of the supercargo are ample for all these purposes, but not so those of the captain. These contingencies, to be sure, might not happen. *But they might;* and as they might, it was the duty of the supercargo to have been on board, to meet them and take care of the interest of his principals. It is fairly to be inferred, that it was the intention of the owner of the goods, that the supercargo should be on board, to meet all possible emergencies; and hence the stipulation, that his compensation as supercargo should be *payable on his return.*

The court below, therefore, it is conceived, erred in fixing the last *terminus* of the supercargo's duty at the signature of the bills of lading at *Coquimbo.* It ought to have been fixed at the return of the cargo to *Baltimore;* the supercargo being as indissolubly wedded to the cargo as the master is to the ship, and having no more right to leave the cargo than the master of the ship.

It is said, however, by our adversary, that if the court have erred in this respect, we have no right to complain of it, because in our prayer we fixed the termination of *Pawson's* services at the investment of *Donnell's* funds in the return cargo; whereas the court, giving us more than we asked, have fixed it at the signature of the bills of lading.

There are two answers to this:

1. That the prayer is misunderstood. It does not make the investment of *Donnell's* funds the termination of *Pawson's* service. It refers to the investment with reference to the time of his death. He died before he had even completed the investment of the funds. The word *even*, it is true, is not there. But it is submitted to the court, that this reciting part of the prayer fairly admits that construction. It is not, however, in the recitals of fact, in a prayer, that you look for the prayer itself. To find the point of the prayer, you look only to that which is the prayer: and in this fourth prayer, the prayer is, that the court will instruct the jury, that the compensation was subject to abatement on two grounds. First, for the abridgment of the voyage, by striking out the *Canton* trip, which formed a part of it, when the compensation was fixed. Second, *for that portion of the contemplated services of* Captain *Pawson, which were lost to the defendant by his death at Coquimbo:* not specifying what those services were, but leaving it open to the defendant to insist, as he is now doing, that those services reached down to the return of the cargo to *Baltimore.* At best, it is mere matter of inference on the other side, that the defendant's counsel considered the services of Captain *Pawson*, as supercargo, to end with his investment of *Donnell's* funds.

2. Suppose the plaintiffs construction of this prayer of the defendant's right: What then? If the court had stopped with the simple rejection of a prayer, wrong in itself, there would have been no ground of complaint. But the court do not stop with a simple rejection of the prayer. They go on to superadd an in-

struction of their own, different from the prayer; and the exception is not only to the rejection of the prayer, but also *to the opinion and direction of the court.* And surely, in the appellate court, it is perfectly competent to the appellant, on such an exception, to test the accuracy of that opinion and direction, by the rules of law. An error in his own prayer cannot deprive him of this right. For in this part of the subject, the question is not, whether the prayer was right, but whether the opinion and direction were right. However erroneously a party may pray when the court, after rejecting the prayer, proceed to give an original opinion and direction of their own, they undertake to pronounce the law of the case, for that is their function. And on an exception to such opinion and direction, the question is, "have the court pronounced the law of the case?" And not, "have they given the appellant something more or better than he asked for?" Have they given him all that he is entitled to? Not, have they given him more than in a mistake of his rights he had asked.

We hold the question, therefore, to be entirely open to us; and the court's opinion and direction were wrong, for the reasons which have been assigned.

We have concluded the argument on *Donnell's* appeal. But as the plaintiffs counsel in the cross appeal, are about to reply on his points, we beg leave to throw together here, for consideration, the arguments which strike us as supporting the court's opinion under the plaintiff's *first*, *second* and *third* bills of exceptions, and as a full answer to those urged by the opening counsel on the other side.

The attempt of the opposite argument is to throw on *Donnell* the loss of the gold, which was confiscated at *Guasco.* The question arises on the plaintiffs' three exceptions, which fully exhibit all the grounds on which the plaintiffs claimed the appropriation of this gold, and the loss of it, to *Donnell*, and on which *Donnell*, by his counsel, resisted it.

The question seems to be a very simple and easy one, when impartially and candidly considered, and the dates of the several transactions carefully noted.

Pawson set out upon this voyage in the double character of master of the ship, and supercargo, for *Donnell.* The instructions addressed to him in the character of supercargo, are found in *Donnell's* letters, which he bore and accepted as the guide of his actions. In *Donnell's* letter of the 18th November, 1819, he says to *Pawson*, in this character of supercargo, "with the ship and the coin on board, you will proceed to the port of *Coquimbo*, in *Chili*, for the purpose of *loading entirely* with copper, and with it proceed to *Canton.*" Again, "if you have the means of completing the purchase, you must put on board at least 12,200 quintals." Again, speaking of the probability of *Pawson's* receiving additional funds from Mr. *M'Clure*, he says, "Should you see him, and he has any funds of mine, or that he has departed from thence, and you find he has placed any of my property in the hands of any person there, in either case, I authorise and empower you to receive and carry it with you, either in *copper*, or *Spanish dollars of the old coin.*" Thus anxiously repeating the instruction, that *all his funds* should be invested *in copper*, and guarding against the possibility of any other investment, more especially a *metallic investment*, except in *Spanish dollars*, and those, too, *of the old coin.* In the close of the same letter he says, "To prevent misunderstanding, I deem it necessary to state your compensation to be $2000, payable on your return, with a privilege from *Canton*, not to exceed twenty-five tons; *but it is understood that you are not to put any copper or heavy article on board at Chili, as my views are that you completely load her with copper, and that also for my account.*" The same solicitude of the owner to invest *the whole of his funds* in copper, is kept up in his letter of the 26th December, 1819, in which he changes the voyage by striking out the trip to *Canton.* That *Pawson* perfectly understood and acceded to *Donnell's* views on this subject, as to the investment of all *Donnell's* funds in copper, is clearly established by his letters of the 15th August, 1820, and the 4th November, 1820, from *Coquimbo.* In these letters he states his progress in the investment of *Donnell's* funds *in copper.* In the last letter he says, "there is now purchased *for your account*, 9,500 quintals, nearly 7000 of which is on board, and the remainder in *Guasco*, whither I shall proceed, and take it in, as soon as I get my crew from *Valparaiso*," &c. And in a subsequent part of the same letter, he says—"I shall, however, be guided by my judgment as the ship comes down in the water, and if possible, bring the *whole of your funds in copper.*" And again in the same letter—"*If I find the ship too heavy laden with your copper, I shall curtail my privilege in that article, and bring my funds in silver.*" It will be observed, that he says in the last letter, he had already engaged for *Donnell* 9,500 quintals of copper, 7000 being already on board, and the rest at *Guasco.* But there were at *Guasco*, as the result has shewn, 3,015 quintals, making an aggregate 10,015 quintals. We have seen *Pawson's* determination, already expressed in his letter, to curtail his own privilege, in order to accomplish the primary object of placing all *Donnell's* funds in copper. And as demonstration of the same purpose, in the discharge of his duty to his employer, he declares to his agents, *Edwards & Stewart*, that he would appropriate to himself only 150 quintals of the copper at *Guasco*, if the ship would not take more than 10,000 quintals, and to carry home the rest of his funds in *Chinchilla* skins and silver. See the letter of *Edwards & Stewart* of January 19, 1821. These were his *declarations*, virtually *his instructions*, made to his agents, *Edwards & Stewart*, before his death. In pursuance of these instructions, they ship for *Pawson* his 150 quintals, (short only by 23 lbs.) leaving applicable to *Donnell's* funds the whole residue of the copper brought home, *which more than obsorbs all his funds.*

Thus, before *Pawson's* death, and while he was yet the agent of *Donnell*, all *Donnell's funds had been invested in copper, in strict compliance with Donnell's instructions, and Pawson's engagements and avowed purpose.* *Pawson's* death, then, left *none of Donnell's funds* at the disposal of *Edwards & Stewart.* It left at their disposal only *Pawson's* funds and *Goddard's*. These had not been appropriated, except in the 150 quintals of copper for *Pawson.* And *Edwards & Stewart* fearing to expend them in the manner which they declare to have been indicated by *Pawson*, (to wit, in silver bars,) expend them in silver, gold and *Chinchilli* skins. These were purchased with *Pawson's* funds, because the previous investment of *all Donnell's, according to his orders*, left no other funds but those of *Pawson & Goddard* at their disposal; and the attempt to throw the loss of the gold on *Donnell*, as if it had been *his*, is one of which the justice has not yet been shewn.

On what ground is the attempt placed? The counsel say that *Edwards & Stewart* bought the gold *for Donnell;* and what is their proof? It is this:

"The gold is invoiced as *Donnell's;* it is put on board, and a bill of lading taken for *Donnell.* The silver, on the contrary, is invoiced as *Pawson's*, and put on board as *Pawson's*, as *per* bill of lading."

The distribution thus made by *Edwards & Stewart* is treated as a *judicial sentence* by these gentlemen, on the rights of the parties.

There would be a little more colour for this, if those gentlemen *had professed* to have acted with full information, and to *have intended to decide on the rights of the parties.* Even then, however, we might have objected to their authority to settle the rights of *Donnell* by their arbitrament, no such authority having ever been communicated to them.

But there is no occasion to take this ground; for those gentlemen *never* did profess to act as agents for the respective parties; *or to judge of their claims, or to make a final distribution and adjustment of their respective rights.*

On the contrary, in their letter of 19th January, 1821, they expressly disclaim any purpose of deciding between *Pawson* and *Donnell.* They profess their want of sufficient information to guide them. They do not even dare to follow out what they believe to be *Pawson's* intentions. If they had, they would have invested the whole of *his* funds, (after the 150 *quintals* of copper,) in silver bars and *Chinchilli* skins. But even this, they do not venture to do. They prefer, they say, passing the whole of *Pawson's* balance to *Donnell;* leaving it to him to settle with *Pawson's* representatives in the manner he, *Donnell*, might think most just and equitable.

Again in their letter of the 28th January, 1821, they apologize for the manner in which they had shipped these articles—their words are "we have only to beg you to call to mind, in case that every thing is not exactly correct, the disadvantages we have been under from the sudden death of Captain *Pawson*."

Here, then, is a strange attempt to attach to the acts of these gentlemen, a consequence which they themselves never dreamed of attaching to them, and while they declare that they are acting *by conjecture*, in the necessity thus thrown upon them by the sudden death of *Pawson*, and while they also declare that their purpose is to refer every thing to *Donnell's* knowledge of the rights of the parties, because of his better knowledge of these rights, the court are called upon, *in the teeth of this declaration*, to consider these gentlemen as acting with full light and with full power, *and as intending to make a final and judicial disposition of this subject between Donnell and Pawson.*

Let us proceed a step farther. Let us impute to these gentlemen, a purpose which it is manifest they never entertained, *to decide* upon the rights of these parties. *What was their power; what their real situation?*

These gentlemen had been appointed by *Pawson*, in his lifetime, to purchase the copper for the Chesapeake. (See his letter to them, of the 19th August, 1820.)

In his letter of September 4th, 1820, to *Donnell*, he informs him he had so appointed them to purchase the *Chesapeake's* cargo.

Pawson, then, was the agent of *Donnell*, acting under written instructions to which he had assented. *Edwards & Stewart* were his *sub-agents* in executing the duties confided *to him* by *Donnell.* They were, then, employed *by him* in executing those duties, *under this sub-delegation of power, and under his superintendance. Their whole power was derived from Pawson's appointment; and, consequently, the limits of Pawson's power, marked the limits of theirs with regard to Donnell. For Pawson could not delegate to them a power which he did not himself possess. But he, Pawson, had no power to buy gold for*

Donnell; and therefore, he could delegate none such to Edwards & Stewart.

During *Pawson's* life, they were acting under his superior and controlling authority. The acts done during *Pawson's* life were conclusive, as between him and *Donnell. The rights acquired by Donnell under these acts, during Pawson's life, were vested rights, which could not be divested by Pawson's successor and subdelegate. The copper already purchased was Donnell's, and at his risk. Edwards & Stewart if they had so wished, could not have altered this state of things. But it is clear that they never proposed it; never thought of such a change.*

Yet, without the power and without the intention to make any such change; declining all interference themselves, and referring all to the decision of *Donnell*, their acts, avowedly with a different aspect, are supposed to have changed the title which was vested in *Donnell*, during the life of *Pawson*, and vested by *Pawson's* own avowed intention and acts.

One of the learned counsel has talked of *Donnell's specific doubloons* having been invested in this purchase. What a notion is this of an *ear-mark* in money! *Pawson* held the whole of *Donnell's* funds, and they were in the hands of *Pawson, blended with his own.* Whether in doubloons or bank notes, or government paper, they became one mass in the hands of *Pawson.* They were placed by him in the hands of *Edwards & Stewart* to make all the purchases, *Donnell's* and his own. Their deposite with *Edwards & Stewart* made them *their funds. They were Donnell's no longer.* They were the property of *Edwards & Stewart*, and they were responsible to *Pawson* for all the funds placed in their hands. The application of the whole mass of these funds was under the direction of *Pawson*, during his life; and whenever he ordered a purchase it is perfectly immaterial to this question, whether *Edwards & Stewart* used these doubloons, or any other portion of their own funds.

It is, respectfully, submitted to the court, that the several opinions of the court below, on this point, were perfectly correct.

Taney (attorney general) in reply.

The only question in controversy in the appeal now under consideration, is the gold and silver shipped at *Guasco*, and seized and confiscated by the *Spanish* authorities. Three of the bills of exceptions taken at the trial all relate to this subject.

The ship arrived at *Coquimbo*, August 15, 1820, and sailed from that place for *Guasco*, January 19, 1821. *Pawson* died at *Coquimbo*, December 4, 1820.

It appears, therefore, that the silver and gold in controversy was shipped after the death of *Pawson*, and at a port which he did not live to reach. It does not appear that any part of the silver was purchased in his lifetime; and it is positively proved that the gold was purchased after his death.

Pawson had under his separate control his own individual adventure, and also the funds belonging to *Goddard*, arising from the sale of the cordage. The appellants are willing to consider the silver to have been bought with the funds under the separate control of *Pawson*, and the gold on account of *Donnell*, and propose that the loss shall be borne accordingly.

But *Donnell* insists that neither the silver nor the gold belonged to him; and that no part of the loss of either can fall on him. The ownership of the gold, seized by the *Spanish* government, is therefore the point in dispute between the parties.

The statement in the record shews that both *Donnell* and *Pawson* had funds in *Chili*, in the hands of *Edwards & Stewart*, at the time they purchased the gold. It moreover, appears, in proof that the funds of *Donnell* were in fact employed in this purchase, and not the funds of *Pawson*. But it is said on behalf of *Donnell*, that his funds could not rightfully be so employed; and that if they were so used, it was a violation of the instructions given to *Pawson*, which instructions bound the funds in the hands of *Edwards & Stewart*.

We do not mean to contend that the death of *Pawson* altered, in any respect, the rights of the parties. We admit that the funds of *Pawson* in the hands of *Edwards & Stewart* had no greater privileges, than they had in his own hands. The first question, therefore, to be decided is, what were the powers and duties of *Pawson*, under the authority and instructions received by him from *Donnell?* And this leads us to consider, in the first place, the question presented by the *second exception.*

In this investigation we do not mean to consider the *intentions*, which *Pawson* is supposed to have entertained. They will be examined in a subsequent part of this argument. The object now is to ascertain the rights of the parties; and when this is done it will not be difficult to decide, how far the rights of *Pawson* can be affected by any designs which he formed in his life time, but which he did not live to carry into execution.

In the *second exception*, the County Court have decided that it was the duty of *Pawson* to invest all *Donnell's* funds in *Chili* in copper, if copper could be had; that *Pawson* could not, consistently with his duty, put on board any copper on his own account, while he had funds of *Donnell* under his control, which could be applied to that purpose; that if *Donnell's* funds in *Chili* were sufficient to load the ship with copper, that no copper could be put on board for *Pawson* or any one else; that if copper enough was put on board, sufficient to exhaust the funds of *Donnell*, no other part of the cargo would belong to him; and consequently that he could not be affected by the loss or seizure of the silver or gold. This is understood to be the opinion of the court, set forth in the *second exception.*

This opinion of the court denies that *Pawson* had any license or permission from *Donnell* to bring copper from *Chili* to *Baltimore*, provided *Donnell's* funds were sufficient to load the ship. It denies also that *Pawson* had any *privilege* from *Chili* to *Baltimore.*

When we speak of the *privilege* of *Pawson*, we mean that kind of privilege which is described by the testimony. A captain's privilege in the sense, in which it is there spoken of, is not a mere permission, revocable at the will of the owner, but is an absolute and vested right to a certain portion of the ship, secured to him by his contract with the owner. This portion the captain may either use himself, or let out for hire to others, and the owner himself must pay for it if he uses it. Such was the character of the privilege from *Canton*, as appears by the testimony in the record.

It will be found, upon recurring to the exceptions and arguments in the other appeal between the same parties, that it was in that case strongly urged on behalf of *Donnell*, that *Pawson* had a certain privilege in copper from *Chili* to *Baltimore*; and that this privilege had been substituted by the consent of parties for the one from *Canton*. The privilege from *Chili*, therefore, was supposed to be one of the same character with that from *Canton*, for which, it was insisted on the part of *Donnell*, the privilege from *Canton* had been exchanged.

If the counsel for *Donnell* were right in the argument just stated, then the opinion of the County Court, given upon their prayer in the exception now under discussion, must necessarily be wrong. For if *Pawson* had a substituted privilege from *Chili* to *Baltimore*, he had a right to bring home copper, or any thing else, to the extent of that privilege, although *Donnell's* funds were not exhausted. But in this prayer they insist that he had no such privilege; that he could use no portion of the ship for his own goods, until the whole of *Donnell's* funds were invested in copper, and shipped on board this vessel; that he might then use any space which happened to be left, and if none was left he could ship nothing. The position taken in the other case is inconsistent with the one they now maintain. If they were right in that case, they must be wrong in this.

It is not, however, contended on the part of *Pawson's* representatives, that he had any privilege (in the sense in which that word is used in the record) from *Chili* to *Baltimore*. We insist now as we did in the other appeal, that the privilege from *Canton* was neither forfeited nor waived; that no privilege from *Coquimbo* or elsewhere was, by the consent of parties, substituted in its place. But that *Pawson* had permission from *Donnell* to bring home from *Chili* the whole of his funds in any thing he pleased, in copper as well as in any other article. We do not say that he was entitled to do this, without paying freight. If he used any part of the ship under this permission, he was unquestionably bound to pay freight. Because as this permission formed no part of the compensation of *Pawson,* there could be no reason for allowing him to exclude the goods of the ship-owner for his own benefit, without paying the usual compensation. *Pawson's* recompense for his services depended upon the original agreement between the parties—that is—the shipping articles, and the letter of November 8, 1819. And the permission, for which we now contend, is neither the privilege secured by that contract, nor any other privilege substituted for it; but is a separate and distinct permission given afterwards,—and given not by way of bargain—but by way of voluntary license;—and which being once executed, cannot afterwards be revoked. This is the character of the permission for which we contend. And we proceed to enquire, whether he had a permission or license of this character, or whether, as the County Court have said, he had no right to bring home any part of his own funds in copper, unless there was space left in the ship, after *Donnell's* funds had been exhausted in the purchase of that article.

The argument upon this point is necessarily very brief. It depends upon the construction of *Donnell's* letter of December 26, 1819. This is a written instrument and must speak for itself, and its true meaning be declared by the court. It is this paper that broke up the original voyage, and directed the new one. And it prescribes what is to be done in the new one. In this letter, *Donnell* says,—"as relates to the investment and disposal of your own funds, you must use your own discretion, *by investing it in copper or any thing else, and bringing it with you in the ship;*—the copper may (as I hope it will) be bought on terms that will, with my funds and yours, load the ship very deep, but if necessary you must load her very deep," &c.

Argument can scarcely assist the court in fixing the true construction of this letter. The permission to *Pawson* is express to invest his funds in copper or any thing else, and bring it with him in the ship. It is not a contingent permission, depending upon *Donnell's* funds loading or not loading the ship. It is not a permission to bring a part of his funds in copper in the ship—nor to fill up any particular space. *Donnell* knew the amount of *Pawson's* funds—for he had given him the bill on *Horstman:* (*see letter from W. F. Reus*,) and with this knowledge he gives to him the unqualified permission to bring home in the ship in copper, or any thing else, the whole amount of his funds.

If, therefore, this permission be an absolute privilege, substituted for the *Canton* privilege by the consent of parties, as has been on another occasion contended for by *Donnell*, then this opinion of the court, which makes it a mere contingent permission, cannot be supported. If it be an absolute and unconditional license, to be used by *Pawson* at his discretion, as we contend, and as the words of the letter seem necessarily to import, then it is equally clear that this opinion of the court cannot be maintained. In either view of the subject, therefore, the judgment must be reversed, unless there be something in the conduct or letters of *Pawson*, which may give to the case a new aspect.

We cannot imagine how any thing contained in the letters of *Pawson* can be relied on to support this opinion of the County Court. The court have said, that he had no right to ship any copper on his own account, provided *Donnell's* funds would buy copper enough to load the ship. We say, on the contrary, that he had permission from *Donnell* to bring home the whole of his funds in copper, if in his discretion he thought proper to do so. And we produce the letter of *Donnell* giving this permission in so many words. Now, whether *Pawson* had or had not this permission, must depend upon the language used by *Donnell*, and not upon language used by *Pawson*. *Donnell* alone could give the permission; *Pawson* could not assume it.

It is true that *Pawson* might, in his discretion, refuse to exercise the permission given. But if he had even done so in express words, it would not support the opinion contained in this exception. The point presented is—had *Pawson* the right, under the permission given by *Donnell*, to bring home his funds in copper, if he thought proper to do so. The court say he had not the right. And, in discussing this question, it can make no difference how far he exercised it, or how far he intended to exercise it. The question is, did he possess the right, if he thought proper to exercise it. He may, in his discretion, have determined not to use the permission to the full extent, nor even in a small degree. Yet that would not destroy his right to use it. The right would still exist, although *Pawson* did not choose to avail himself of it. And, in order to support this opinion of the County Court, *Donnell* must shew, not how *Pawson* used his discretion, but that he had no discretion to exercise. And, whether he had or had not the power to exercise any discretion on the subject, must depend on the letters of *Donnell*, who alone could confer or withhold the power.

We cannot, therefore, perceive how *Pawson's* letters, detailing what he had done or intended to do, can affect this question. It is not suggested that in any of his letters he has admitted that *Donnell* recalled the permission, given by his second letter. And, unless the letters of *Pawson* contained this admission, it is not easy to discover in what other way they could prove that the right, which had been vested in him by the license of *Donnell*, had afterwards been extinguished. Any declarations which may have been made by *Pawson*, as to the manner in which he intended to use the discretionary power confided to him by *Donnell*, would not be binding on him, nor limit the range of his power. Every intention entertained or expressed would be liable to alteration, as the business advanced, and at any time before he had acted. In stating this position, however, we shall not be understood to mean, that after *Pawson* had actually purchased copper on account of *Donnell*, he could convert it to his own use, and ship it on his own account. This we admit could not be done. When he had once purchased copper for *Donnell*, he had then exercised the discretion with which he was entrusted, and the copper would remain *Donnell's*, and must be shipped as his property. But we insist that he had the right, instead of purchasing for *Donnell*, to purchase copper for himself to the amount of his own funds, and that this power remained until he acted, and by purchasing, either for himself or *Donnell*, exercised the discretion, and put an end to the power. When we speak here of *Pawson's* funds, we must not be understood to include the proceeds of *Goddard's* cordage.

If, however, we look at the intentions of *Pawson*, as expressed in his letters, or disclosed in the letters of *Edwards & Stewart*, nothing will be found to sanction the opinion which the court have expressed. He uses no expression which indicates a belief on his part, that he was obliged to exhaust *Donnell's* funds in copper before he could ship a single pound for himself, as the County Court have decided. On the contrary, if you resort to his own letters, or those of *Edwards & Stewart*, he does not appear to have doubted that he had a right to ship a large amount of copper. How much he supposed himself entitled to bring in this vessel does not appear. But it is abundantly evident that he considered it, in a great measure, as a matter resting in his discretion; and upon which he intended to decide, when he had more certainly ascertained how much could be brought. It seems never to have been supposed by him that his right to bring any was altogether contingent, and depended upon the ability of the ship to bear it, after all *Donnell's* funds had been first so disposed of. On the contrary, he never seems to doubt his right—he doubts only to what extent he will use it. *See his letter to Donnell, dated November* 4, 1820—*and the letter of Edwards & Stewart, dated January* 19, 1821.

It is very certain, if *Pawson* had lived, he would have used the permission given by *Donnell* very sparingly. He had the strongest inducements not to displease *Donnell.* He was in his employment. And *Donnell* was a man of vast wealth—extensively engaged in commerce—who, we admit, paid his agents liberally while they lived, and were useful to him; and with whom, therefore, *Pawson* would naturally wish to stand well, and be most careful not to offend. Besides, he acted under the influence of higher and better feelings. He was the trusted agent of *Donnell*, and as such seems upon all occasions to have preferred the interest of his principal to his own. This was obviously the case in the purchase of gold in *London*; and it is equally manifest from his own letters, and the letters of *Edwards*

& Stewart, that he was prepared again to surrender what he believed to be his rights, in order to advance the interest of *Donnell*:—that he had determined, in his own language, to curtail his privilege in copper;—that is—to take less than what he had a right to take, in order more effectually to serve *Donnell*. We admit most distinctly, that if he had lived, he would have waived his own rights in favor of his principal; and it was his intention to do so.

But we are not now to inquire what rights *Pawson* intended to waive, or what he intended to insist on. It is our business to ascertain what were his rights; and whatever rights he had at the time of his death, it is the duty of his representatives to maintain, although we may even be satisfied that he himself intended to surrender them, if he had lived. If the right was not actually surrendered, it belongs to the representatives; for they can have none of those inducements to waive them, which might very properly have operated on the mind of *Pawson*.

We have already endeavoured to show the character and extent of these rights, and hope we have established the following propositions:

1st. That *Donnell's* letter of December 26, 1819, gave to *Pawson* permission to bring home his whole funds in copper, if he thought proper to do so.

2d. That this privilege had never been recalled by *Donnell*, nor surrendered by *Pawson*.

Assuming these two propositions, let us in the next place see what were the rights of the respective parties, when adjusted according to these principles.

Pawson had the right, under the license given by *Donnell*, to invest his own funds in copper in preference to *Donnell's*, and bring the copper home in the ship. It was also the duty of *Pawson*, under his instructions, to invest *Donnell's* funds in that article, provided the ship would bring it, together with his own. But if the funds of both would overload the vessel, *Pawson* was without orders in that contingency; and consequently was left to exercise a sound discretion, as to the manner in which the surplus funds of *Donnell* should be invested.

In this state of things it must be conceded on all hands, that whenever *Pawson* bought copper for *Donnell*, and with *Donnell's* funds, the copper became his property, and could not afterwards be appropriated by *Pawson* to his own use, if he had been so disposed. And whenever he bought copper for his own use, and with his own funds, the copper belonged to him, and could not become *Donnell's* unless it was transferred to him by his own consent, as well as that of *Pawson.* For *Pawson* had a right so to invest the funds of either party; and when the investment was once made by him, he could not of himself recall it. And indeed any other rule would have been liable to great objections. Because, although copper was the favourite article, and preferred by both parties, yet as it was not all bought at once, but in different lots, the price was subject to variation, and he might have been obliged to give for some parcels more than he had given for others; and it becomes important, therefore, to fix at once for whom the purchase was made. Besides, although copper proved the most fortunate cargo, it might have happened otherwise; and if it had come to a losing market, and the gold and silver arrived safe, the latter articles might have proved the best investment. In every view, therefore, the purposes of justice required that when the discretion was exercised, and the purchase made by the funds of one of the parties, the article purchased should become at once the property of him for whose use it was bought, and should not afterwards be transferred to the other, without the consent of both parties.

Assuming this to be the true principle, let us look at the state of the funds at the time of *Pawson's* death, and what was done with them afterwards. And this brings up the question in the *first exception.*

On the 4th of November, 1820, *Pawson* had bought for *Donnell* 9500 quintals, nearly 7000 of which was then on board at *Coquimbo*, and the remainder at *Guasco*, to which place the *Chesapeake* afterwards intended to sail. (*See Pawson's letter.*) So far we have an actual appropriation of *Donnell's* funds. But we have no other appropriation during his life, and no evidence that any more copper was purchased by him. A large amount of copper was afterwards bought at *Coquimbo.* For it appears by the bill of lading, that instead of the "nearly 7000 quintals" at *Coquimbo*, mentioned in *Pawson's* letter of November 4, 1820, as purchased and shipped there for *Donnell*, there was in fact, 8076 quintals and some pounds shipped from *Coquimbo.* And there is no evidence to show for whom the additional 1076 quintals were bought; nor indeed any thing to show whether it was bought in Pawson's life time, or after his death. The 9500 quintals, bought for *Donnell*, did not exhaust his funds; it left between six and seven thousand dollars of *Donnell's* funds unappropriated; and there is no evidence to show that the additional quantity of copper was bought for him, or with his funds;—nor that any further specific appropriation of the funds of *Donnell* were made by *Pawson* in his life time. But whether any further specific appropriations of *Donnell's* funds were or were not made, it is in proof that they were not all appropriated. For it appears by the testimony, that some of *Donnell's* doubloons brought from *England* had not been expended in the purchases made for him by *Pawson*; and that these specific funds of *Donnell* were applied after the death of *Pawson*, and by the advice of his successor, in the purchase of the very gold, which was afterwards seized by the *Spanish* government. Now, as the specific funds of *Donnell* were appropriated to the purchase of this gold, and it was bought on his account, the purchased gold belonged to him, and the loss must be borne by him.

We have already endeavoured to show, that if the *Chesapeake* would not bring all *Pawson's* funds in copper, and all *Donnell's* funds also, that as *Pawson* had no specific directions how to dispose of *Donnell's* surplus funds, he had a right to exercise a sound and honest discretion on the subject, and might invest them in any article he deemed best. He died, leaving funds of his own and funds of *Donnell*, also unappropriated. The money of both of them came to the hands of persons who had no instructions, from either *Pawson* or *Donnell*, and no authority from either of them. Neither *Lane*, nor *Edwards &*

Stewart, in whose hands these funds remained, were appointed the agents of *Donnell*, or the agents of *Pawson*. In this state of things the money was in their hands in the same condition, and subject to the same rights, as when it remained in the hands of *Pawson*. *Edwards & Stewart*, who held the funds, became trustees for the respective parties, according to the amount of their respective funds, and according to their respective rights of investment and shipment. And when the funds of either party were invested in a particular article, that article became the property of the party whose fund was used in the purchase. The thing purchased belonged to him, and could not be claimed by the other. And if it were lost or destroyed, he could not put that loss on the other party. If indeed the trustee had misbehaved himself in the purchase, and a loss had thereby happened, the party injured would have been entitled to demand compensation of the faithless trustee. But nobody, under such circumstances, could have acted more discreetly or honestly, than *Edwards & Stewart*. There is no pretence of complaint against them. But whether *Donnell* had, or had not cause of complaint against them would not have altered the case. The funds were in the hands of *Edwards & Stewart*, precisely as they had been in the hands of *Pawson*. The funds of *Pawson* had an absolute right, derived from *Donnell*, to be invested in copper, and brought home in the ship. The funds of *Donnell* had a right to be invested in the same article, if the ship would bear it. But if the ship would not bear it, the surplus might be invested in any manner that the sound discretion of the agent would justify. These were the rights of the parties while *Pawson* lived, and the funds were in his hands. Upon his death, the funds in the hands of *Edwards & Stewart* were liable to the same appropriation, and subject to the same rights; and, by the hands of *Edwards & Stewart*, the surplus funds of *Donnell* have been specifically appropriated to the purchase of the gold. This appropriation would have been a lawful one by *Pawson*: it was equally so when made by *Edwards & Stewart*. If the shipment had proved fortunate, *Donnell* would have had a right to hold it, in opposition to *Pawson*'s representatives; and as it has proved to be unfortunate, he cannot throw the loss upon them. It is unnecessary to cite many cases on this subject. *Taylor vs. Plumer*, 3 *Maul. and Selw.* 574, is in point. In page 575, it is said "the product of, or substitute for, the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such." The gold in question was "the product of, or substitute for," the doubloons of *Donnell.* He clearly had a right to follow the gold bought, and to claim it to the exclusion of *Pawson;* and it would be contrary to every notion of justice to give him the right to it, if it was found to be profitable, and enable him, if unfortunate, to throw the loss on *Pawson.* If he takes it all, he takes it for better or for worse. And if he has been wronged in the purchase, it was not by *Pawson*, for he died before the purchase. But in truth he has been wronged by nobody. The investment was judicious and discreet at the time, although it afterwards proved unfortunate. And as it was purchased with his money it belonged to him, and the court have therefore erred in the opinion contained in the *first exception*, as well as in that given in the *second exception*, which was first examined.

So far we have argued the case according to the rights of the parties, at the time the gold in question was purchased, and without reference to any thing that happened afterwards. We proceed now to show, that if *Edwards & Stewart* had not possessed the power to make this investment of the funds of *Donnell*, yet that *Donnell*, by his subsequent conduct, has adopted it and assented to it, and cannot now dispute it, even if he might have done so, when first informed of the transaction.

This point arises under the *second and third exceptions*: It presupposes that *Pawson* in his lifetime, and *Edwards & Stewart*, after his death, had no right to invest any part of his funds in copper, and bring it home in the *Chesapeake*, until *Donnell's* funds had been first exhausted in the purchase of that article, and had been found to be insufficient to load the ship. But, assuming this to be the law of the contract between *Donnell & Pawson*, we insist that if *Pawson* in his lifetime, or *Edwards & Stewart* after his death, holding in their hands the funds of both parties, did specifically and separately appropriate them in any particular manner; and if *Donnell and Pawson's* representatives, after notice of such appropriations, acquiesced therein, that such acquiescence will bind the parties, and neither of them could afterwards reject and disallow it, without the consent of the other party.

We have certainly offered evidence of all the facts above stated. 1st. It is admitted by the statement, and in prayer of the appellee that, upon the death of *Pawson*, a large proportion of the funds of both parties were in the hands of *Edwards & Stewart*.

2d. These funds were specifically appropriated. The gold in question was purchased with the money of *Donnell*, and shipped on his account. See where *Edwards & Stewart* speak of it as *Donnell's* gold. The *Chinchilli* skins, the one hundred and forty seven quintals and seventy-nine pounds of copper, and the silver mentioned in the same bill of lading, were separately shipped on account of the funds under the immediate control of *Pawson*. See letters of *Edwards & Stewart*. Also the bills of lading. When we speak here of the funds under the immediate control of *Pawson*, we mean his own and *Goddard's*, as distinguished from *Donnell's*. The balance of *Pawson's* separate account was passed to the credit of *Donnell*, and invested for him, and shipped on his account. The 900 pigs of copper, and the thirty-six lumps of gold were shipped on *Donnell's* sole account. And it is distinctly admitted in the argument, and the evidence and figures shew it, that *Donnell's* funds, independent of those transferred to him by *Edwards & Stewart*, would not purchase the 900 pigs of copper. These 900 pigs contained 113 quintals more than *Donnell's* own funds would have purchased, after exhausting every dollar that *Donnell* had in the hands of *Pawson*.

3d. *Donnell* and *Pawson's* representatives had notice of these specific appropriations, and acquiesed in them.

The acquiescence of *Pawson's* representatives is not disputed. They claim, according to adjustment made by *Edwards &*

Stewart, and have always so claimed. They sue on that ground. See, also, *Graham's* letter, May 15, 1822.

Donnell, also, had notice and acquiesced. The *Chesapeake* arrived at *Baltimore*, on her return from this long voyage, October 1, 1821. *Donnell* then received the letters of *Edwards & Stewart*, and their accounts, and the bills of lading, and invoices contained in the record, which gave him notice of every thing that had been done, as above stated. So far as to notice: Now, as to acquiescence. He received this notice, October 1, 1821. The 147 quintals, shipped on *Pawson's* account, as before mentioned, were delivered to his representatives as his share, October 29, 1821. All the rest, it seems, was retained as *Donnell's*. Some months afterwards, and after a full investigation of all the accounts of the voyage, *Donnell* states an account with *Pawson*. We have said that this account was made out after a full investigation of the accounts of the voyage, because the paper itself upon the face of it, shows that this was the case; and we have said that it was made out some months afterwards, because the earliest evidence of its existence is to be found in Mr. *Graham's* letter of May 15, 1822. In this account he states the 147 quintals and 79 pounds, as the whole of *Pawson's* interest in the copper. See the item in the account, in which he charges him with his proportion of the expense of landing and reshipping the copper. *Donnell* had, at that moment, in his hands 113 quintals more than his own funds could have purchased. Yet he gives no account of this, and speaks of the 147 quintals and 79 pounds as the whole of *Pawson's* interest. If *Donnell* acquiesced in the transfer to him of $7777 87 by *Edwards & Stewart*, then he was not bound to speak of this 113 quintals, because he would be debtor for the $7777 87, transferred to him, and he would be entitled to all the cargo purchased with it, and, consequently, to the 113 quintals above mentioned. If he does so acquiesce, then he adopts, also, the shipment of the gold, and, of course, gives up the matter in controversy. The gold was shipped on his sole account. And if he adopts and ratifies the acts of *Edwards & Stewart*, as to the 113 quintals of copper bought with part of the sum transferred to him, it will hardly be said that he may reject the gold, because it was unprofitable or lost. In fine, he may in this aspect of the case accept the transfer of the $7777 87, or reject it altogether. He cannot accept it in part, and reject it in part. He has accepted it as relates to the 113 quintals. If he has acquiesced as to that, he must acquiesce as to the gold also.

It can hardly be supposed that *Donnell* did not acquiesce as to these 113 quintals. They were bought with part of the sum of $7777 87, transferred to him as aforesaid. He had no other funds to buy it. If he did not mean to assent, then these 113 quintals belonged to *Pawson's* administrators. Yet *Donnell*, after a full view of the whole ground, accounts with them, without allowing them these 113 quintals. And after taking all the copper to himself, and these 113 quintals with the rest, he makes himself debtor for $185 09 only. Whereas, if this copper belonged to *Pawson's* administrators, it was of itself worth in *Baltimore* more than $2000. *Donnell*, therefore, stands in this dilemma. If he did not mean to ratify what was done by *Edwards & Stewart*, then he was bound to deliver over this copper to *Pawson's* representatives, for which he himself had not paid, and had no funds to pay. If he did mean to ratify what was done by *Edwards & Stewart*, he had a right to retain it. In the first case, he could not rightfully withhold it. In the second, he might honestly do so. He did retain it, honestly and justly we say, because the funds were transferred to him, and it was shipped on his account. It will not, be said on his behalf, that he withheld it from the account from any unworthy motive. He must therefore have acquiesced in the arrangements made by *Edwards & Stewart*. His conduct in regard to these 113 quintals of copper can be justified on no other ground.

We do not ask the court to say that this conduct was, in point of law, an acquiescence or consent on the part of *Donnell*, and irrevocably bound him. But we insist that it was *evidence* of his acquiescence and consent, after notice of the manner in which the funds had been appropriated; and being evidence of such acquiescence and consent, it ought to have been left to the jury to say from the evidence, whether he did, or did not acquiesce in the disposition of the funds made by *Edwards & Stewart*. If he did assent, it is quite clear that in point of law he cannot afterwards recall it. The case of *Prince vs. Clark*, 8 *Serg. & Lowb.* 54, is directly in point on this subject. In that case the agent applied the funds of the principal in a manner not authorised:—in this case, it is assumed for the sake of the argument, that the same thing was done. In that case the principal received notice of the manner in which his funds had been applied, May 29, 1822; and gave notice of his dissent, August 7, 1822; that is, in less than two and a half months afterwards. In this case *Donnell* must have received notice of the application of his funds, when the ship arrived, October 1, 1821; and he expresses no disapprobation of the transfer of *Pawson's* funds to his account, until he rendered his account. And there is no evidence of the time of rendering that account, but the letter of Mr. *Graham;* which letter is dated May 15, 1822, seven months and a half after the arrival of the ship. If in the case of *Prince vs. Clark*, the silence of the principal, or rather the absence of any evidence of dissent by him for the space of two and a half months, was evidence, from which the jury might properly find that he had acquiesced and assented to the act of the agent;—surely the silence of *Donnell*, for the far longer period above stated, was evidence, from which a jury might have inferred his assent and acquiescence in the acts of *Edwards & Stewart*, in the transfer of *Pawson's* funds to him, and in the shipment of the copper *and gold*, on his "*sole account*," as stated in the letters and bill of lading. Indeed this case has this strong additional circumstance against the principal, that the legal representatives of *Pawson* were known to him, were living in the same town with him, and to whom he had delivered the property, shipped on account of *Pawson*, October 29, 1821. And in the case of *Prince vs. Clark*, it was not very clear that *Leigh* was the proper person to receive the notice; and if he was the proper person, it was not very clear that *Prince* knew it. We confidently, therefore, rely upon this case to prove that the court erred in the opinion contained in the *third exception*, in which they decide that the evidence above stated, is not a ratification of the acts of *Edwards & Stewart.* Whether *Donnell* did, or did not consent to them was a question of fact for the jury, and not of law, for the court. And if he did acquiesce in them after notice, and the jury had so found, then in point of law it ratified what *Edwards & Stewart* had done.

So far we have considered the case as if *Donnell* in his account had dissented from the appropriation of the funds made by *Edwards & Stewart.* But is this the meaning of the account in question? Does he in this account dissent from what had been done? It is very true that he says, in noticing this item, that the transfer of $7,777 87, was very improperly made to him. But he does not reject it. He does not refuse to accept it. On the contrary, he credits *Pawson* with the whole amount, rejects from it *Goddard's* funds, and then reduces the balance by charging freight, the cost of the gold, &c. &c. and, finally, leaves a balance against himself, on account of this transfer of $112 49; and this sum of $112 49 is a part of the balance of $185 09, which *Donnell* admits to be due from him to *Pawson's* representatives. Is not this a direct acquiescence in the transfer? Is it not a positive adoption of it? True, he complains of it, and denies the right of *Edwards & Stewart* to make it. Yet he accepts it; accounts, as he supposes, for all but $112 49; and admits that he owes that sum on account of this transfer. If he did not accept it, he owed nothing on that account. He does, therefore, in admitting this balance to be due, also admit, by necessary implication, that he assented to the transfer.

The account is in writing; and whether *Donnell* does, or does not by this account accept the transfer above mentioned, must depend upon the language of the account which is to be taken all together; and being in writing, is to be expounded by the court. We have endeavoured to shew the court, that by the true construction of the account, he has assented to and accepted the transfer. If we are right in this, then the court ought to have instructed the jury that, "*under the circumstances of the case,*" the account of *Donnell* was a ratification of the acts of *Edwards & Stewart.* For, if by the written language of the account, according to its true interpretation, *Donnell* had accepted the transfer, his assent was in point of law a ratification; and the other evidence need not have been left to the jury. If, however, we are wrong in our interpretation of this account, yet all must concede to us that the circumstances, herein before detailed and relied on, furnish evidence from which a jury might have inferred his consent, and that therefore the opinion of the court cannot be maintained.

It has been said that this copper was retained by *Donnell*, in order to meet any claim that *Goddard* might make against him. Now the motive which induced him to retain was necessarily a question of fact for the jury, and not one of law for the court. *Donnell* contends that he retained it to meet any demand that *Goddard* might make: we insist that he retained it as his own property, shipped to him and on his own account by *Edwards & Stewart.* In this state of the dispute the jury must decide the controversy. The court cannot decide what motive or intention influenced *Donnell.* It is a question of fact. The argument, therefore, on the motives which governed *Donnell*, does not tend to support the opinion given by the court. As the motive was controverted, it was not in the province of the court to decide the controversy. It may not, however, be improper to remark here, that *Donnell* does not, in his account, suggest that he retained this copper for the reasons now assigned in the argument. He gives no account of it whatever, and *Pawson's* representatives did not know any thing about it. It is quite evident that *Goddard* could have no claim against *Donnell*, or against the copper brought in the *Chespeake.* He never pretended to have a claim against either; and we shall be ready, at the proper time, to shew that he has no just demand against *Pawson's* representatives. With that controversy, however, we have nothing to do at this time. It is sufficient for us, on this occasion, to show that it cannot be taken as an admitted fact, that *Donnell* retained this copper for *Goddard.* The opinion of the court, therefore, in the *third exception*, cannot be sustained on that ground.

There is another objection to the opinion contained in the third exception, which we must briefly notice. We understand the first branch of the direction to be this:—that if *Pawson*, in his lifetime, was willing to waive the privilege he had to bring home his whole funds in copper, but died before he had actually invested the funds in his hands, and before he had actually waived it, that his declared intention, his *willingness* to curtail his rights would bind his representatives, and compel them to relinquish what Pawson had been willing to relinquish, and had intended to relinquish, but which intention he had not, in his lifetime, carried into execution. This, we presume, must be admitted to be the meaning of the first branch of this direction.

Upon what principle can it be sustained? Is there any case in which the intention to do an act has been held to bind the party, or his representatives? It is not pretended that he did, by any act of his own, surrender a part of his privilege; nor is it supposed that he contracted to surrender it, or any part of it. The direction stands on the hypothesis, that he was *willing* to accept less than he was entitled to. His willingness to do an act cannot be equivalent to the act itself. We are not to inquire what either party was willing to do, but what they had done; and what were their rights at the time of *Pawson's* death; for it is according to these rights that the cause must now be decided. It is time, however, that this argument should be brought to a conclusion.

We have endeavoured to show,—1st, that *Pawson* had the permission of *Donnell* to bring home in copper the whole of his own funds, if in his discretion he thought proper to do so. And that this permission had never been recalled by *Donnell*, nor surrendered by *Pawson*. 2d. That upon the death of *Pawson* the funds remaining unexhausted came to the hands of *Edwards & Stewart*, clothed with the same rights and privileges that belonged to them, in the hands of *Pawson*. 3d. That being so in their hands, *Edwards & Stewart* were not bound to exhaust *Donnell's* funds in copper, before they invested any part of *Pawson's* funds in that article; but, on the contrary, had a right to invest if they thought proper to do so, the whole of *Pawson's* funds in that article, and send it in the ship. 4thly. That *Edwards & Stewart*, holding thus the funds of both parties in their hands, and *Pawson's* funds having a right to be preferred in the investment in copper; if *Edwards & Stewart* in the exercise of an honest discretion, actually invested any part of *Donnell's* funds in gold, that the gold became the property of *Donnell;* and, if a profitable investment, he was entitled to claim it; and if it proved to be a losing one, he could not throw the loss on *Pawson's* representatives. 5thly. We have endeavoured to show that whatever might have been the rights of the parties, there is evidence to prove that all of them, after notice, acquiesced in what was done by *Edwards & Stewart;* and if from that evidence the jury should find such acquiescence, *Donnell*, as well as *Pawson's* representatives, are bound by it, and cannot recall it, no matter what might have been their rights before. And 6thly, we have endeavoured to show that by his account, *Donnell* has given a written assent to the appropriations of the funds made by *Edwards* & *Stewart;* and that although he denies the propriety of the transfer to him, yet he adopts it, and states the account upon the principle, that he is to account for the money so transferred, and does not deliver or offer to deliver the property in which it was invested, but retained it as if it were his own. And, relying upon the soundness of these propositions, the case is submitted to the Court.

Dorsey J. at this term delivered the opinion of the Court.

Of the refusal of the Court to grant the instruction prayed for, which forms the ground of appeal on the appellant's first bill of exceptions, we entirely approve. Had the instruction been given, it would have been a palpable invasion of the unquestionable and exclusive right of the jury: that of deciding on facts, of which contradictory testimony is adduced. The appellees "had offered in evidence, that it was the usage among ship owners and masters, not to charge freight where the ship was in ballast, for any articles shipped by the captain on his own account." The appellant then "offered in evidence that there was no usage as above stated, and that the captain was liable to freight to the owner, like any other person, if he chose to exact it." In such a state of the proof, the court could not do otherwise than reject the prayer, calling on them to decide a fact thus controverted.

In the appellant's second bill of exceptions are involved questions of great magnitude to the commercial world and of much intrinsic difficulty; and we regret that we are called to the decision of these questions, without proof of commercial usages upon the subject. In the argument it is conceded by both parties, that the owner of the ship and cargo has the uncontroled power of breaking up or changing the voyage, but they differ most widely as to the consequences which would ensue, and the nature of the responsibilities, to which the owner would thereby be subjected. For the appellant it was contended that this well established prerogative of the ship owner, entered into the contemplation of *Donnell* and *Pawson*, who contracted in reference to it. That upon its exercise no new liabilities were created; the *Canton* privilege no longer formed any part of the contract; nor had *Pawson* any claim to indemnity for its loss. This is assuming much broader ground than was occupied by the prayer to the court below: which appears predicated on the admission of *Pawson's* title to recover, but for his alleged voluntary relinquishment of his right. The appellees, on the other hand, insist, that upon the change of the voyage, *Pawson* was not only entitled to claim an indemnification for the injuries thereby sustained: but the full value of the *Canton* privilege, exempt from all the casualties to which it was naturally liable: and also the whole compensation, stipulated as an allowance to the supercargo, whether the services for which it was equivalent were ever rendered or not; all which on the part of the appellants, is strongly controverted. The principles, contended for by each party, are perhaps stretched further than reason or justice would sanction or public policy requires. And it may readily be imagined, how the counsel on both sides, if yielding to the impulse of their clients interest, would have changed hands in the argument, had a new modification been given to the facts, in the case, which whilst it varied its aspect, would not in the slightest degree have removed it from the operation of the principles now attempted to be applied to it. Suppose, for example, the voyage contracted for had been from *Baltimore* to *London*, and thence home with a cargo of dry goods, the stipulated compensation of Captain *Pawson*, in addition to his monthly wages, being three hundred dollars; but no privilege. After the sailing of the vessel, owing to a sudden depression in the price of dry goods, *Donnell* changes the voyage: directs that eight thousand doubloons be taken on board at *London:* be transported to *Coquimbo:* there converted into a full cargo of copper: which was to be sold at *Canton*, and the proceeds of sale there invested by *Pawson* in a suitable invoice were to be brought home by him, in the *Chesapeake* to *Baltimore:* under such circumstances would *Pawson's* counsel, as they now do, insist on the compensation fixed in the original contract, when the emolument incident to the substituted voyage, by universal usage of trade, were twenty times as great as those which belonged to the original? Impelled by the interests of their client, they surely would require, the accustomed reward for the services rendered. Whilst the counsel for the appellant, if influenced exclusively by his interests, would insist on his discharge, upon payment of the sum specified in the agreement.—But suppose another case slightly variant in circumstances, but the same in principle—A ship-owner in *Baltimore*, for a fixed compensation (say $300) employs a captain to navigate his vessel to the *Havana:* there to sell his outward and purchase a return cargo. Before she reaches the mouth of the *Chesapeake*, her destination is changed; she is ordered on a trading voyage that may last for years; she is to double *Cape Horn* and return by the *Cape of Good Hope;* would it be attempted to limit the reward for the captain's services to the sum mentioned in the original agreement? But to present the question on facts more immediately before us, suppose the *Chesapeake* on her originally destined voyage, before she had passed the waters of *Maryland*, had been ordered to *Norfolk*, there to sell her cargo and return to *Baltimore;* could it be pretended that *Pawson* would in such circumstances have been entitled to the two thousand dollars, and the undiminished value of the *Canton* privilege!

If the rule contended for either by the appellants or the appellees be a good one, it must work both ways, as well to cases where the length of the voyage is increased, as where it is diminished. In its operation it would always work injustice to one party or the other; and in the latter case, it would, in effect, annihilate that acknowledged and invaluable right in ship owners, of controling the destination of their property; as its enjoyment would be visited by penalties more than equivalent to the losses apprehended from the original, or benefits anticipated from the substituted voyage. Reason, justice and public policy, are never to be lost sight of in the construction of commercial contracts; in unison with which, it would be difficult to reduce the rules insisted on by the parties to this controversy. The principles which should govern cases like the present, according to our views, (in the absence of all commercial usage on the subject,) are these. If by the exercise of this important privilege, a special injury is done to the captain or supercargo, the ship owner must bear the loss; he must make a reasonable indemnity. If on the contrary, by the change of voyage the captain or supercargo be necessarily discharged from the performance of all the duties, for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished. If a part of the duties have been executed, then such a proportion of the stipulated compensation should be allowed, as appears just, on comparing the services rendered, under the voyage originally contemplated, with those which remain unperformed. For the interpolated part of the voyage the usual compensation must be paid. The parties should be placed, as nearly as may be, in the same condition in which they would have stood, had a previous contract, for the voyage as changed, been entered into between them. To all the customary emoluments of a captain or supercargo, on such a voyage, are those officers respectively entitled.

The County Court, we therefore think erred, in the appellant's second bill of exceptions, in refusing to instruct the Jury as prayed, that "the plaintiff (below) is not entitled to any compensation, for the alleged loss of the privilege of bringing home the twenty-five tons from *Canton;*" that being a privilege, so inseparably connected with the vessel's destination to *Canton;* that upon its ceasing, *as it did*, to be one of the *termini* of the voyage, the privilege of necessity expired with it.

With the opinion of the court below in the third bill of exceptions we concur. The alleged misconduct of the captain, having produced neither injury nor inconvenience to the appellant, forms no defence to the present action.

According to the views before expressed by us, the County Court were in error in their refusal to grant the prayer in the appellant's fourth bill of exceptions; and also in the opinion and direction they thereon gave to the jury, and in conformity with the same views, we approve of their refusal of the opinion and direction prayed for in the appellant's fifth bill of exceptions.

The decision made by this court on the second bill of exceptions, renders it unnecessary for them to examine the opinion of the County Court in the appellant's sixth bill of exceptions: as by that decision the appellant's prayer becomes wholly immaterial and irrelevant to the issues in the cause; and let the determination of the County Court be what it might, it would furnish no ground for reversing their judgment. The same may be said in relation to the appellant's ninth bill of of exceptions.

Of the refusal of the Court below to grant the prayer in the appellant's seventh bill of exceptions we in part approve and in part disapprove. They were wrong in refusing to instruct the jury that the plaintiffs below were not entitled to recover the said sum of two thousand dollars: but were right in refusing to instruct the jury that they were not entitled to recover "any part thereof."

We concur with the County Court in their refusal to grant the appellant's prayer contained in his eighth bill of exceptions.

There being cross appeals in this case, it now becomes necessary to consider the exceptions on the part of the appellees. It has been attempted to sustain the opinion of the County Court in the appellee's first bill of exceptions, on the ground that

Edwards & Stewart were the agents not of *Donnell*, but of *Pawson*, and, that he only must be answerable for their acts. With this doctrine to the extent to which it is urged we cannot concur. It is in proof, that it was the known and necessary custom of trade at *Chili* and at *Coquimbo* in the business in which *Pawson* was engaged, to employ agents on shore, such as *Edwards & Stewart*. That the selection of such agents in this case, was not made bona fide, and with discretion, there is no insinuation. The consequences of the neglect, omissions, or misconduct of *Edwards & Stewart*, in their agency, not imputable to *Pawson*, must be borne by *Donnell;* in fact they are his agents, though appointed by, and under the immediate control of *Pawson*. For their acts therefore, after *Pawson's* death, not flowing from any instructions previously given by him, in relation to *Donnell's* funds, they only, and to him alone, are answerable. This doctrine is fully sustained by the opinion of this court in the case of *Jackson vs. The Union Bank of Maryland*, 6 *Harr. & Johns.* 150, and by the late decision of *Judge Hallowell* before a special jury in the district court of the city and county of *Philadelphia*. In refusing, therefore, to give the instruction prayed for, we think the County Court erred.

The prayer in the appellee's second bill of exceptions being in the alternative, the court below were right in instructing the jury, that if *Pawson* in his lifetime made the investment in gold, that he must bear the loss; but in the instruction given on the latter branch of the alternative, we conceive the court were wrong, upon the grounds assumed by us in the consideration of the appellee's first bill of exceptions. It being a question, under all the proofs and circumstances of the case, fairly open for discussion before the jury; whether the purchase of the gold was made under any instruction or authority from captain *Pawson*. By their decision, they have determined that matter of fact in the affirmative, and consequently overleaped one of the barriers interposed between the court and the jury.

The first branch of the third exception of the appellee's, is inaccurately drawn; and if construed according to its obvious import, might have been rejected by the court for irrelevancy to the matters in issue before them. It prays an instruction to the jury "that the plaintiff (below) is not entitled to recover of the defendant, the amount of any gold or silver, which the said *Pawson*, or his agents, the said *Edwards & Stewart*, may have put on board the *Chesapeake*, of their own accord, and without the knowledge, consent or orders of the defendant (below) and which may have been afterwards seized by the government of *Chili*, and confiscated as having been attempted to be exported contrary to the laws of the land." The plaintiff did not claim to recover the amount of any gold or silver; on the contrary, the gist of the controversy was his disclaimer of all interest in the gold or the funds with which it was purchased. The prayer was therefore inapplicable to the issue. But give to the exception that construction which has been ascribed to it in the argument; that it presents the question whether the amount of this gold, could by the jury be discounted from any claim which *Pawson* might have upon *Donnell*, and the prayer is too wide to be gratified in *extenso.* If the investment in gold was made by *Pawson* in his lifetime, or in obedience to his directions, then the discount contended for should have been sanctioned by the court; but if the investment were the act of *Edwards & Stewart* without orders from *Pawson*, then the loss of the gold shipped must fall upon *Donnell.* The instruction of the County Court embraces both alternatives, and is therefore erroneous. In their opinion, on the latter part of this exception, regarding the ratification by *Donnell*, of the purchase and shipment of the gold, we concur with the County Court.

Having assented to the decisions of the court below, contained in the appellant's first, third, fifth and eighth bills of exceptions; but dissented from those in the appellant's second, fourth and seventh bills of exceptions; and having dissented from their opinions in the appellees three bills of exceptions:

Their JUDGMENT IS REVERSED AND A PROCEDENDO AWARDED.

WIRGMAN'S Adm'rs *vs.* MACTIER.—*December*, 1829.

THE owner of a ship after she was laden at *Baltimore*, on the 14th May, 1810, agreed with the shippers of the cargo, in writing, that their goods were "to be landed in a permitted port on the continent of *Europe*, (meaning that they were not to be landed at the Island of *Sylt*) before the freight should be earned, *but should the whole of the continent be shut*, the freight, with an addition as arbitrators might determine, would be earned, should the property be landed in *England*, agreeably to the custom of the country." On the 25th April, 1810, a charter party had been entered into for the same ship, by which the owner covenanted to proceed with his ship from *Baltimore*, north about, for the Island of *Sylt*, thence to *Hamburg* or *Bremen*, if open to American ships, if not, the cargo to be landed at *Sylt* if permitted, and in case of refusal there, thence to such permitted port in the *North Sea* or *Baltic*, as the master and supercargo might direct; and should the *Baltic* be closed against the admission of *American* vessels, then to such other port as the master and supercargo might again direct. The freight was to be paid agreeably to the bills of lading, *provided* the cargo was discharged at a port in the *North Sea;* but if delivered at any port in the *Baltic*, an advance in the freight was covenanted for; and should the *Baltic* be shut, a further advance in the freight to be settled by arbitration. On the 8th May, 1810, a bill of lading was also signed for the plaintiff's goods, which stated the ship to be bound from *Baltimore* for *Sylt*, and a permitted port in the *North Sea* or *Baltic*, the goods to be delivered at the aforesaid permitted port, unto *P* of *Hamburg*, who was not the supercargo of the ship. In an action where the plaintiff claimed under these contracts, he offered testimony to establish that certain ports in *Europe*, not on the *North Sea* or *Baltic*, were open to *American* vessels, but the court held that looking to the historical facts and occurrences of the time, it was manifest that the voyage was undertaken, and the charter party, bill of lading, and agreement entered into, with a view to the then political state of affairs in *Europe*, and should be construed with a view thereto—that the permitted port on the continent of *Europe*, in which, the goods were by the agreement to be landed, before freight could be earned, was intended to be a permitted port in the *North Sea* or the *Baltic;* and also that all the said instruments must be construed in connexion with each other, and the general terms in the agreement of the 14th May, restricted to the *North Sea* and *Baltic;* and therefore rejected the testimony offered, as inadmissible and irrelevant.

Whether ship owners are entitled in equity and good conscience, to retain money received on account of freight, is clearly a question not to be left to the jury; but proper only to be decided by the court, under the circumstances of each case.

So where in an action of *assumpsit* brought by the owner of merchandize shipped in the defendant's vessel, to recover a sum which the defendant had received and retained for freight, it appeared that the shipment was made under the charter party, bill of lading, and agreement above referred to, and that the master was furnished with instructions from the plaintiff, as follows, "on account of the unsettled state of affairs on the continent of *Europe*, I have thought proper to request my friends Messrs. *P. & Co.* of *Hamburg*, in the event of the cargo of the ship being denied entry at their port, to consult with you on the further destination of the ship, and the disposal of my interest on board. In case they have no friend at the port she may proceed for, you will please take charge of it, and advise with them what is best to be done for my interest. On your arrival off *Sylt*, should the situation of affairs be such as to prevent you from communicating with Messrs. *P. & Co.*, in that case you will have to proceed with the cargo where you judge it will be most advantageous for all concerned, when I shall consider my part as entirely under your charge, &c." The ship sailed on her voyage, was captured before her arrival off *Sylt*, taken into a port in *Norway*, but ultimately released. The master, after the restoration of his ship and cargo, without consulting with the consignees about the further destination of the ship, or disposition of the plaintiff's property, although he had the means of communicating with them, proceeded with his ship to *England*, there delivered his cargo, and received (from the agents who sold the cargo,) as freight, the sum claimed in this action. HELD, he was not entitled to retain it.

Where by the municipal regulations of certain ports, a certificate of origin was necessary to the admission of certain merchandize there, a shipmaster having received such goods on board his ship, and signed a bill of lading for their delivery at one of such ports, cannot in the absence of evidence to shew it was the duty of the shipper to furnish such a certificate, set up the fact of that document not being on board his ship, as an excuse for not entering the port at which he had agreed to land the property entrusted to him; nor as a justification for his delivering it at another port, and thereby earn freight.

APPEAL from *Baltimore* County Court. This is the same case which was before this court at December Term, 1819, (4 *Harr. & Johns.* 558,) on appeal from *Baltimore* county, wherein the Judgment was reversed, and the record remitted under a *procedendo.*

1. At the second trial, the same evidence was offered as on the first trial, and which is set out in the bill of exceptions then taken, [see 4 *Harr. & Johns.* 568] except that stated in page 574, lines 5, 6, 7, 8 and 9, from the bottom, as to the under-

standing of the merchants of *Baltimore*, &c. Also that of *H. Campbell*, in page 575, lines 5, &c. and substituting that of *James Dooley* as hereafter mentioned. Also omitting in page 575, lines 3, 4, 5, 6 and 7 from the bottom. The defendants in order to prove that *Peter Wirgman* was ordered to leave *Denmark* by the Collector of the Customs at *Flekkefiord* without delay, read in evidence the deposition of *James Dooley*, taken by consent. He deposed "that he was the second officer on board the ship *William Wilson*, *Peter Wirgman*, commander, on a voyage to *Europe*, in the year 1810. In the month of October or November of the same year, while the said ship was lying at *Flekkefiord*, in *Norway*, and before the Admiralty proceedings against said ship were terminated, the deponent was present at conversations between *E. Thomman*, supercargo of said ship, and said *Peter Wirgman*, in which the said *Thomman* united with the said *Wirgman* in determining that in the event of the liberation of said ship and cargo, they would proceed with the same to the port of *Hull*, in *England*. That subsequent to the above conversation, and while the said ship lay at *Flekkefiord*, as aforesaid, the said *Thomman*, in the absence of Captain *Wirgman*, asked this deponent, and *Walter Pratt*, first officer of said ship, what time it would require to get said ship in readiness for sea; and then declared his determination to proceed with said ship and cargo, in the event of their liberation, to *Hull*, as aforesaid. That a day or two afterwards the said *Thomman* left *Flekkefiord* and proceeded, as this deponent understood, to *Christiansand*, and this deponent did not see him afterwards. This deponent further saith, that sometime in the latter end of November, the said ship left *Flekkefiord*, and dropt down to the *Albernes*, and remained there until about the 10th day of December, when Captain *Wirgman* came on board from *Flekkefiord*, accompanied by a pilot, who ordered the ship to be got under weigh; and declared, in answer to a question put to him by this deponent, why he meant to proceed with the ship to sea that night, that he had received an order to that effect from inspector *Lassen*, who was the Collector or Custom-house Officer at *Flekkefiord*. This deponent further saith, that two or three days before the said ship proceeded to sea, the said *Wirgman* sent an express to *Fahareund*, to hurry the said *Thomman* on to *Albernes*, to join the said ship. That the said *Peter Wirgman* expressed an anxiety that the said *Thomman* should arrive at *Albernes* before the said ship proceeded to sea. That after the said ship had got down to the harbours mouth, the night being very tempestuous and stormy, Captain *Wirgman* prevailed upon the pilot to return with said ship to her former anchorage, alleging the weather as an excuse, but in reality, as this deponent understood, to afford further time for the said *Thomman* to join the ship; but that the said ship, after getting within a quarter of a mile of her former anchorage, was struck aback and compelled to proceed to sea; that the said ship proceeded to *Hull*, and that on her passage, this deponent heard Captain *Wirgman* frequently express a wish that said *Thomman* had joined the said ship at *Albernes*, as the said *Thomman* had promised."

The defendants further offered evidence that the cargo of the plaintiff was colonial produce; and to prove that no American vessel, laden with colonial produce, would have been permitted at the time the said ship *William Wilson* left *Norway*, as aforesaid, to land the said produce in any port in the *Baltic* or *North Sea*, unless the cargo of such vessel was accompanied by proper certificates, shewing the origin thereof, and that the same was not the produce of *Great Britain*, or any of her colonies, read in evidence, by consent of the plaintiff, from the *British Register*, the *American Register*, the *American state papers*, and the *Federal Gazette* newspaper, published in *Baltimore*, in the year 1810, certain orders, decrees and municipal regulations of *France*, *Denmark*, *Prussia*, *Russia*, *Austria* and *Sweden*, which it was agreed shall be read in the argument of this cause before the Court of Appeals. The defendants also offered in evidence, that *Wirgman*, after he left *Flekkefiord*, as aforesaid, was without further means, or opportunity of communicating with the said *Parish & Co.* until his arrival at *Hull*, as aforesaid.

The plaintiff then offered to prove by *John Donnell*, a witness, sworn at the bar, that a certain ship or vessel, called the

Eleanor, belonging to the said *Donnell*, with a cargo consisting of colonial produce, had sailed from *Baltimore*, in the year 1810, and proceeded to *Constantinople*, a port on the continent of *Europe*, situate on the *Dardanelles*, where she had landed and delivered her cargo in safety, without any molestation by the government of that country; and also offered in evidence by the same witness, that in the year 1810, a vessel belonging to him proceeded to the port of *Salonica*, on the continent of *Europe*, on the *Morea*, loaded with colonial produce; and also offered evidence that the port of *Gibraltar*, on the continent of *Europe*, was, in the year 1810, open to *American* ships, loaded with colonial produce. To the admissibility of which evidence the defendants objected, because the said evidence had no relation to the matter in controversy in this suit, between the plaintiff and defendants; but the court [*Archer*, Ch. J. and *Hanson* and *Ward*, A. J.] overruled the said objection, and admitted the said evidence; being of opinion and so directed the jury, that the contract of the said *Charles & Peter Wirgman* with the plaintiff, was not limited to the ports of the continent in the *North Sea* or *Baltic*, but extended to every port of the continent of *Europe* whatsoever. To which opinion and direction and the admission of said evidence, the defendants excepted.

2. The defendants then moved the court to direct the jury, that if they shall believe that agreeably to the orders and decrees of *France*, *Prussia*, *Russia*, *Sweden*, *and Denmark*, as produced in evidence in this cause, all uncertificated colonial produce was prohibited from entry into the ports of those respective countries, and that the captain of the ship *William Wilson* was unprovided with a certificate of origin for that part of the cargo which belonged to the plaintiff, and which consisted of colonial produce; that then the captain was justified in not attempting to enter any of the ports of the countries before mentioned, to land the said cargo, and that in proceeding to *Hull* for that purpose he fulfiled the contract between the plaintiff and the ship owners, and entitled them to freight according to said contract, and consequently that the plaintiff cannot recover in this action. Which direction the court refused to give. The defendants excepted.

3. The defendants also moved the court to direct the jury, that if from a consideration of all the circumstances as given in evidence in this cause, they shall be of opinion, that the defendants are entitled in equity and good conscience, to retain the money by them received, that then the plaintiff is not entitled to recover on the first count of his declaration. Which direction the court refused to give. The defendants excepted.

4. The defendants further moved the court to direct the jury, that if they shall be of opinion that all the ports of the continent of *Europe*, on the *North Sea* and in the *Baltic*, were closed by municipal regulations against the admission of a vessel and cargo in the predicament of the *William Wilson* at the time of her liberation by the Court of Admiralty at *Christiansand*, and that in these circumstances, the *William Wilson* was expelled from the ports of *Norway* by the orders of the *Danish* government so suddenly as not to allow time for a further correspondence between *Peter Wirgman* and *David Parish & Co.* of *Hamburg*, that by these events, and by force of the letter of instructions from the plaintiff to *Peter Wirgman*, of the 8th day of May, 1810, the said *Wirgman* became the special agent of the plaintiff, and that being such special agent if he proceeded to *Hull* and then accepted that part of the cargo which belonged to the plaintiff in satisfaction of the contract, he the plaintiff is not entitled to recover in this action. Which direction the court refused to give. The defendants excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN and DORSEY, J.

Meredith for the appellants, contended: 1. On the *first* bill of exceptions, that the evidence offered by the appellee, was irrelevant and inadmissible; because, by the true construction of the contract, it looked for the destination of the cargo, to a permitted port in the *North Sea*, or *Baltic*, and not to a port, or ports on the continent, situated on any other sea.

2. That such being the true construction of the contract, and appellants having offered evidence, that agreeably to orders

and decrees of *France*, *Prussia*, *Russia*, *Sweden* and *Denmark*, all uncertificated colonial produce was prohibited from entry in the ports of those respective countries; and that the goods of the appellee, which consisted of colonial produce, were unaccompanied by a certificate of origin, the court erred in refusing to direct the jury, as stated in the second bill of exceptions, that if they believed said evidence, the captain was justified in not attempting to enter any of the ports of the countries before mentioned, to land the said cargo; and that in proceeding to *Hull*, for that purpose, he fulfilled the contract of affreightment, and entitled the owners to freight, and that consequently the appellee was not entitled to recover; because, by his own omission and negligence, he had prevented the appellants from proceeding to any of the said ports.

3. On the *third* bill of exceptions, that whatever may be the legal construction of the contract, this being an action for money had and received, the jury had a right to take into their consideration, all the equitable circumstances disclosed by the evidence, and to find a verdict for the appellants, if in their opinion, the appellants had a right in equity and good conscience to retain the money received as freight, even though, had it not been received, they would not have been entitled to recover it, in an action against the appellee, upon the contract of affreightment.

4. On the *fourth* bill of exceptions, that the court below erred in refusing the direction therein prayed; because, although the contract is admitted to extend to every part of the continent of *Europe* whatsoever, still *Peter Wirgman* having been constituted by the appellee, as his special agent, in a certain emergency, if the jury believed such emergency to have occurred in point of fact, then *Peter Wirgman*, as such special agent, had a right to alter the destination of the goods of the appellee, within the limits of the contract; and having actually done so by proceeding to *Hull*, and there accepting that part of the cargo which belonged to the appellee, he entitled the appellants to freight, and, therefore, prevented the appellee from recovering in this action.

1. On the *first* bill of exceptions. The question is, whether the charter party or the letter or agreement of the 14th of May, was the contract between the parties to this suit. A parol agreement inconsistent with one under seal, cannot be set up against the agreement under seal. 3 *Stark. Evid.* 1002. *White vs. Parkin*, 12 *East.* 578, 583. *Wood vs. Day*, 7 *Taunt.* 646, (2 *Serg. & Lowb.* 247.) *Abbott on Shipping*, 454. The agreement of the 14th of May, is repugnant to the charter party. The charter party stipulates, that the cargo might be landed at *Sylt;* and the agreement of the 14th of May, is, that the cargo should not be landed at *Sylt.* If the agreement of the 14th of May, did not control the charter party, was the construction given to that agreement, consistent with the charter party? *Com. on Cont.* 23, 24, 25, (*Ed.* 1824.) The contract originally stood alone on the bill of lading. The charter party, in fact, was not executed until the 14th of May. The ports in the *Baltic* and *North Seas* only were in the contemplation of the parties; no other construction can be given to their agreements. The construction of general expressions in agreement is to be restrained. 6 *Bac. Ab. tit. Statute*, 381. *Adams vs. Woods*, 2 *Cranch*, 341.

2. On the *second* bill of exceptions. It was the duty of the plaintiff below, to provide certificates of origin of his part of the cargo, required by the municipal regulations of the countries mentioned in this exception. He had covenanted by the charter party to do so.

3. On the *third* bill of exceptions. The *first* count in the declaration is for money had and received. It is an equitable count; and the defendants are entitled in equity and good conscience, to retain the money received by *P. Wirgman.* The plaintiff cannot go into the original liability of the party.

Scott, for the appellee, referred to the decision of this court on the former trial in this case, as reported in 4 *Harr. & Johns.* 568, and to the argument of the counsel as taken in manuscript, but not reported, to show that what has been relied on by the counsel for the appellants now, was not then insisted on. 1. On the *first* bill of exceptions, he cited *Pow. on Cont.* 370, 371. 2. On the *second* bill of exceptions, he stated that more than fourteen years had elapsed between the transaction and the last trial, so that it could not be proved whether or not the captain was furnished with the necessary certificates. The objection raised at the last trial, had not been urged at the former one, or the necessary proof might have been then procured. There was no evidence adduced that the vessel was prevented from entry into any of the ports, because of the want of the certificate. She had been captured, but was acquitted at one of the ports. 3. On the *third* bill of exceptions, he cited 2 *Com. on Cont. part* 3, *Ch.* 6, *Am. Reg.* 21.

Taney (Attorney General of Maryland) on the same side. 1. On the *first* bill of exceptions. This court in the former case, decided that the parties could make a contract different from the charter party, as to the separate property of any of the shippers. The charter party was a mere formal paper. It was not delivered, and no action could be supported on it. It was executed for no other purpose, but as necessary to make the ship's papers regular. It cannot be the deed of the parties, unless it was intended as such. *Com. on Cont.* 25, 27, 28. *Moorson vs. Page*, 4 *Campb.* 103. 5 *Petersdorff*, 363, 367, 310, 372, 350, 351, 371. *Barker vs. Hodgson*, 3 *Maule & Selw*, 267. 2 *Barnw. & Ald.* 17. *Hadley vs. Clarke*, 8 *T. R.* 259. *Smith vs. Wilson*, 8 *East.* 437. *Touteng vs. Hubbard*, 3 *Bos. & Pull.* 295 (*note.*)

2. On the *second* bill of exceptions. The jury were not the judges of the written decrees of foreign countries. The construction of those decrees was for the court, and not for the jury. *Etting vs. Bank of United States*, 10 *Wheat.* 50. Did any of the decrees prevent the entry of the vessel, unless she had a certificate of the origin of the cargo? The captain was not bound to sail without the certificate, if it was necessary. Is it a paper of the cargo or of the vessel? *Abbott on Shipping*, 260, 261. Who was to prove that the certificate was on board of the vessel? If the captain was to prove that it was not on

board, then he did not prove that fact. It is to be presumed to have been on board of the vessel. It was not in the power of the plaintiff to prove that it was on board, as it was in the possession of the captain. The captain did not attempt to enter the port, but sets up an excuse for not attempting it. He was then bound to prove why he did not. *Van Omeron vs. Donrick*, 2 *Camb.* 42. *Tarleton vs. M'Gauley*, *Peakes N. P. Cas.* 205.

3. On the *third* bill of exceptions. The jury are not to decide what is equity and good conscience. *Hunter vs. Princep.* 10 *East.* 378.

4. On the *fourth* bill of exceptions. There is no legal evidence of the fact that the vessel was ordered away from *Flekkefiord.* It was only the declarations of the pilot, which are not evidence.

Wirt, in reply. 1. The construction attempted and insisted on by the counsel of the appellee, is, that there were two agreements—one between the ship owners and the appellee, and the other between them and the other shippers. There is a sealed instrument and an unsealed instrument, inconsistent with each other. Which is to give the law of the contract? Can an agreement under seal be revoked by an agreement not under seal? The authorities already cited on the part of the appellants are admitted; but it is said that this court decided the question on the former trial. That question was not before this court on the former appeal, as to the comparative dignity of the two instruments. General expressions found in a statute are to give way to the intention of the legislature. 1 *Blk. Com.* 87. *Com. on Cont.* 533. *Woods vs. Fulton & Stark*, 2 *Harr. & Gill*, 71.

2. If the court were not called on to expound the decrees of the foreign countries offered in evidence, then the jury were the judges of both the law and the fact. But the jury were not required to expound the decrees at all. The question put to the jury was, if they believed that agreeably to the decrees, the ports of the countries were closed as to uncertified colonial produce, and there was no certificate, &c. then *Wirgman* was

justified in going to *England*. The certificate was necessary for the safety of the cargo, but not for the vessel. The owner of the vessel could not know whence the cargo came; that was in the knowledge of the freighters. *Holt on Shipping*, 81. *Levy vs. Costerton.—Holt's Rep.* 170. The plaintiff was bound to prove that the certificate was on board of the vessel. He might have proved by the consul at *Baltimore*, that he had obtained the certificate required. How could *Wirgman* prove that it was not on board? He could not prove a negative. But it has been insisted, that it is to be presumed that all necessary papers were on board, and *Van Omeron vs. Dowick*, 2 *Campb.* 42, was relied on for that purpose. In that case it was the officer of the same country, and it was presumed he did his duty. It has nothing to do with the case now before this court. The case of *Tarleton vs. M'Gawley*, *Peakes N. P. Cas.* 205, is not applicable to the present question.

4. On the *fourth* bill of exceptions, he referred to *Drake vs. Hudson & Franciscus*, 7 *Harr. & Johns.* 399.

Buchanan, Ch. J. delivered the opinion of the Court.

This is an action of assumpsit brought to recover a sum of money retained by *Charles & Peter Wirgman*, who were the owners of the ship *William Wilson*, on account of freight, out of the proceeds of that part of the cargo, shipped on board that ship, which belonged to the appellee; and the question is, whether freight was earned or not.

Four bills of exceptions were taken at the trial. The appellee who was the plaintiff below, offered to prove, that the ports of *Constantinople* on the *Dardanelles*, of *Salonica* on the *Morea*, and of *Gibraltar*, all on the continent of *Europe*, were in the year 1810, open to *American* vessels loaded with colonial produce, an objection to the admissibility of which testimony, made on the part of the appellants, was overruled by the court. This forms the subject of the first bill of exception, and involves the construction of the contract, between the appellee and *Charles & Peter Wirgman*.

It is stipulated in the charter party, that the master shall proceed with the ship from *Baltimore* for the island of *Sylt*; "and if, on arrival there, it can be ascertained that the ports of *Hamburg* and *Bremen* are open to the admission of *American* vessels, that the said master shall forthwith proceed to whichsoever the said ports, the supercargo and himself shall think most for the interest of the freighters. But should the said ports of *Hamburg* and *Bremen* continue closed, then the said cargo shall be landed at *Sylt* if permitted; and in case of refusal to permit the same to be landed at *Sylt*, that then the said master shall proceed therewith to such permitted port on the *North Sea* or the *Baltic*, as he and the supercargo shall order and direct. And should the *Baltic* be also closed against the admission of *American* vessels, in such case the said master shall proceed with the said cargo to such other port, as he and the said supercargo may in their discretion think most proper. And that on the arrival of the said ship at the port of delivery, the said master shall and will make a right and true discharge of the said cargo, to the supercargo, or to such other agent, factor or consignee of the freighters, as they may direct, agreeably to the bills of lading to be signed for the same, and so end and finish the said intended voyage, &c." and the freighters covenant to "pay freight for said cargo agreeably to bills of lading to be signed for the same, provided the said cargo be discharged at a port in the *North Sea*; but if delivered at any port in the *Baltic*, not higher than *Kiel* or *Colberg*, then &c. to pay unto the owners an advance of &c. on the amount of freight money stipulated in the said bills of lading. If higher than *Kiel* or *Colberg*, and not higher than *Koningsburg*, a like advance of &c. and if higher than *Koningsburg* a like advance of &c., and should the *Baltic* be shut, a further advance to be settled by arbitration, &c."

This is not an action upon the charter party, and it is not perhaps necessary to inquire what would be the proper construction of that instrument if it stood alone. But taken together with the bill of lading, to which it refers, it seems very clear that the permitted port contemplated, was a port in the *North Sea* or the *Baltic*.

One of the stipulations in the charter party is, that in case of a refusal to permit the cargo to be landed at *Sylt*, the master shall proceed therewith to such permitted port in the *North Sea* or the *Baltic*, as he and the supercargo shall order and direct. And another is, that on the arrival of the ship at the port of delivery, the master shall discharge the cargo, to the supercargo, or to such other agent, &c. of the freighters, as they may direct, agreeably to the bills of lading to be signed for the same, and so end and finish the said intended voyage, with a covenant by the freighters to pay freight agreeably to the bills of lading to be signed. And the bill of lading for the goods of the appellee, states the ship to be bound from *Baltimore* for *Sylt* and a permitted port in the *North Sea* or *Baltic*, and that the goods are to be delivered at such permitted port, unto *Messrs. David Parish & Co. Hamburg*, or their assigns, he or they paying freight, &c. at certain stipulated rates.

Here then is a charter party, in which the owners engage to deliver the cargo at a permitted port in the *North Sea*, or the *Baltic*, to the agent of the freighters, agreeably to the bills of lading to be signed, and so to end the intended voyage; and the freighters to pay freight agreeably to the bills of lading, with certain stipulated advances.

And a bill of lading of the goods of the appellee, in which, they are contracted to be delivered at a permitted port in the *North Sea*, or the *Baltic*, to *Messrs. Parish & Co. Hamburg*, or their assigns, at certain rates of freight therein mentioned.

So far then as concerns the goods of the appellee, it is a contract for the delivery of them at a permitted port in the *North Sea*, or the *Baltic*, to the *Messrs. Parish & Co. Hamburg*, or their assigns, at the rate of freight mentioned in the bill of lading, and the advances stipulated in the charter party, and the ending of the voyage by such a delivery of the goods at such permitted port. The charter party by the references to the bills of lading, in the provisions for *the delivery of the cargo* to the agent of the freighters, "agreeably to the bills of lading to be signed," and *the payment of freight* "agreeably to the bills of lading to be signed," adopted, and made a part of it, the stipulation in the bill of lading of the appellee's goods, for the delivery of them at a permitted port in the *North Sea*, or the *Baltic*, to the *Messrs. Parish & Co. Hamburg*, or to their assigns, and for the payment of freight; and is the same, as if instead of referring to the bills of lading, it had expressly stipulated, that the master should deliver the goods of the appellee, at a permitted port in the *North Sea*, or *Baltic*, unto *Messrs. David Parish & Co. Hamburg*, or to their assigns, for the freight mentioned, and so end and finish the said intended voyage; that is, to end and finish the voyage, as respected the interest of the appellee, by a delivery of his goods to the *Messrs Parish* & *Co.* or their assigns, at a permitted port in the *North Sea* or *Baltic*.

There were a number of persons interested in the cargo besides the appellee; and the different provisions in the charter party, with the engagement to deliver the cargo agreeably to the bills of lading, (in the plural,) were probably introduced to meet the views and interests of the several shippers, according to the stipulations of their respective bills of lading, and whatever latitude may have been given in any of the other bills of lading, that for the goods of the appellee, limited the contract in relation to them to a port in the *North Sea*, or *Baltic*, and surely the parties were competent so to contract.

Then comes the memorandum or agreement of the 14th of May, 1810, entered into by the owners, which is in these words: "We hereby agree and acknowledge, that the sundry goods shipped by you on board the ship *William Wilson*, *Peter Wirgman*, master, are to be landed in a permitted port on the continent of *Europe*, (meaning that they are not to be landed on the Island of *Sylt*,) before the freight is earned. But should the whole of the continent be shut, the freight with an addition, (as arbitrators may determine,) will be earned, should the property be landed in *England*, agreeable to the custom of the country." And this agreement is supposed so to alter and control the voyage, as to extend the contract between the *Wirgmans* and the appellee to any port on the continent of *Europe*.

This cause was once before in this court, on an appeal from the judgment of the *Baltimore* County Court, and on a reversal of that judgment, was sent back under a *procedendo*—and it is probable that, that court has been misled by the loose language of the opinion delivered on that appeal, and has supposed, that the contract of the parties was held by this court, to relate not merely to ports in the *North Sea* or the *Baltic*, but to any port on the continent of *Europe*, no matter where, or in what sea, as is now insisted upon here. And perhaps, looking to the opinion alone, that would be its construction; but it was certainly not so intended. Having delivered the opinion myself, I can speak confidently on the subject, and regret that it was not delivered in more guarded and restricted terms.

But the idea, that the contract looked for the destination of that part of the cargo at least, which belonged to the appellee, to any permitted port on the continent of *Europe*, other than a port on the *North Sea* or *Baltic*, was not suggested in the argument, which was particularly, and with great force, directed to the political state of affairs in *Europe*, in reference to what was commonly called the continental system, and the advanced and inclement season of the year, which it was contended forbid an attempt by the master to navigate the *Baltic;* and with the danger of capture and detention by privateers, justified his proceeding to *Hull*, and there delivering the cargo. The whole course of the argument which was a very elaborate one, pointed to a state of things having no connexion with, or relation to, other ports on the continent of *Europe*, not in the *North Sea* or *Baltic*. The question whether the contract contemplated any other permitted port on the continent of *Europe*, than one in the *North Sea* or the *Baltic*, was not raised, nor thought of by the court, at least by myself; but looking only to those seas, and construing the engagements between the parties, with reference to the known state of affairs in *Europe*, as likely to operate upon the governments on the continent, having ports in those seas, and not the governments without the influence of that state of things, and having ports in other seas, the broad terms, *the whole of the ports on the continent of Europe*, to be found in the opinion delivered, were too carelessly perhaps taken from the agreement, and were not meant to be used with reference to all the ports of the continent, no matter where or in what seas, as the ports intended by the contract, at some one of which the goods were to be delivered, before freight could be earned: but to the ports only on the continent of *Europe*, in the *North Sea* or the *Baltic*, according to the subject matter then in the view of the court. And that we think, is the only legitimate construction that can be given to the papers at that time, as now before us.

Looking to the historical facts and occurrences of the time, to which we may judicially look, and cannot well shut our eyes against them, it is manifest that, the voyage was undertaken, and the charter party, the bill of lading, and the agreement entered into, with a view to the political state of affairs in *Europe*, and should be construed with a view to that state of affairs; and so interpreted, it is not difficult to perceive, that the permitted port *on the continent of Europe*, in which the goods were, by the agreement to be landed before freight could be earned, was intended to be a permitted port in the *North Sea* or the *Baltic;* other ports on the continent of *Europe*, such as *Constantinople*, the ports in the *Morea* and *Gibraltar* not being affected by the system, the state of things, in the view of the parties, and the ports of the continent in the *North Sea* and the *Baltic* being alone within their influence.

The question is not what would be the correct construction of the agreement of the 14th of May, 1810, if it stood alone, without any index pointing to the intention of the parties, that could be properly looked to; or any thing in the context, to restrict the understanding of the general terms used, according to their plain and popular meaning, to a mere special and peculiar sense; but it is apparent that, that agreement relates to the voyage, contemplated by the charter party and bill of lading of the appellee's goods, and the acknowledgment that they are to be landed in a permitted port on the continent of *Europe*, before freight is earned, has reference to, and so far recognizes the contract arising from those instruments, and should therefore be construed in connexion with them, and that contract, looking for the destination of the appellee's goods, to a permitted port in the *North Sea* or *Baltic*, the agreement speaking in relation to that contract, must be understood, by the terms "on the continent of *Europe*," to mean on the continent of *Europe*, in the *North Sea* or *Baltic*, and to have used those terms only for the purpose of showing, that the goods were to be landed on the *continent*, as distinguished from the *Island of Sylt*, and that interpretation is given to it, by the clause immediately following in the agreement itself, "*meaning that they are not to be landed on the Island of Sylt*," that is, that the terms "on the continent of *Europe*" mean *not on the Island of Sylt*, or denote, that they were not to be landed on the Island of *Sylt*, but on the continent only, before freight could be earned, and were used for that, and no other purpose. And the words in the last clause, "but should the whole of the continent be shut," have reference to what goes before, and must be construed to mean the continent, in the same restricted sense, in which it is before spoken of, that is, the whole of the continent of *Europe* on the *North Sea* and *Baltic*—and cannot mean any part of the continent, not contemplated in the preceding part of the agreement. Under this construction of the agreement, taken in connexion with the charter party and bill of lading to which it relates, the contract between the parties is, that the goods shipped by the appellee shall not be landed on the Island of *Sylt*, but at some permitted port on the continent of *Europe* in the *North Sea* or *Baltic*, before any freight shall be earned; but in the event of the whole of the ports on the continent of *Europe* in the *North Sea* and *Baltic* being shut, then, and not otherwise, the owners shall be entitled to freight on the goods being landed in *England*, with a stipulated addition.

The ports of *Constantinople*, on the *Dardanelles* of *Salonica*, in the *Morea*, and of *Gibraltar*, were not the permitted ports contemplated by the contract; proof therefore of their being open in the year 1810, to *American* vessels loaded with colonial produce, was irrelevant and inadmissible, and the testimony of *John Donnell* ought to have been rejected.

By the term *shut*, as used in the contract, is meant an occlusion by the municipal regulations of the country, and unless in that sense of the term, all the ports on the continent of *Europe* in the *North Sea* and *Baltic* were closed against the admission of the goods of the appellee, on board the ship *William Wilson*, the vessel could not earn freight by going to *England;* nor then, unless the instructions given by the appellee in his letter of the 8th of May, 1810, to *Peter Wirgman*, the master, were complied with.

It has been contended, that if agreeably to the orders and decrees of *France*, *Prussia*, *Russia*, *Sweden* and *Denmark*, all uncertificated colonial produce was prohibited from entry into any of the ports on the continent, in the *North Sea* or *Baltic*. It was incumbent on the appellee to have furnished the captain of the ship with a certificate of origin of that part of the cargo which belonged to him; and that if he neglected to do so, the captain fulfilled the contract of affreightment by proceeding to *Hull*, and there delivering the cargo. But we think otherwise, and that the want of such a document alone, was not sufficient to justify the captain in proceeding to *Hull*, and there delivering the appellee's goods. All parties were aware of the unsettled state of affairs in *Europe*, and the difficulties that would probably attend the landing of the cargo at any of the contemplated ports in the *North Sea* and *Baltic*. The charter party and bill of lading show it; the agreement and letters of instruction prove it. The goods were shipped, and the voyage undertaken, with the expectation of having risks and difficulties to encounter, and the contract and instructions were framed accordingly. The ship owners knew when they signed the agreement, which was subsequent to the bill of lading, that no certificate of origin was on board, and with that knowledge, and a knowledge of the character of the cargo, made their engagement with a view to the difficulties that might attend the landing of such a cargo, under such circumstances; and can no more avail themselves of the want of that document, because of the prohibition merely of uncertificated colonial produce, than they could have done of the fact, that the cargo consisted of colonial produce, if the prohibition had been of all such produce, uncertificated or otherwise. If in the latter case, they could not have sheltered themselves under the pretext alone, that the cargo consisted of colonial produce, and was therefore prohibited from entering any of the contemplated ports, having made their contract in relation to such a cargo; neither can they in this case, avail themselves of the circumstance alone, that the *appellee's part* of the cargo consisted of uncertificated colonial produce, and was therefore prohibited, having made their contract in relation to goods in that known predicament. The same reason would seem to apply in one case, as in the other; the prohibition in both being of the goods on board. In one, of goods without a certificate of origin; in the other, either with or without such a certificate, and there is no evidence in the cause to show that it was incumbent on the appellee to have provided such a paper, to enable him to resist the claim of the ship owners to freight, or that he was required to do so. The shipment was made on a calculation of chances, and the knowledge, advice and assistance of the *Messrs. Parish & Co. Hamburg*, were evidently much relied upon for the success of the enterprise. And to obtain the benefit of their counsel and assistance, the appellee, in his letter of instructions to *Peter Wirgman*, the master, informs him, that he had requested them to consult with him on the further destination of the ship, and the disposal of his interest on board, in the event of an entry being denied at *Hamburg*; directing him to advise with them, as to what was best to be done for his interest; and constituting him his agent, if the state of affairs should be such as to prevent his communicating with them; in which case, he tells him to open his letter of instructions to them, to which he refers him for his government. These instructions the master was bound to obey; it was his duty diligently to seek and to pursue the advice and directions of *Messrs. Parish & Co.* and if agreeably to the orders and decrees of the governments of *France*, *Prussia*, *Russia*, *Denmark* and *Sweden*, the goods of the appellee were prohibited from entering the ports on the continent of *Europe*, in the *North Sea* and *Baltic*, yet there might have been such occasional suspensions of them, or relaxation in the enforcement of them, as to render the information and advice of *Messrs. Parish & Co.* of the first importance. And it would seem to have been in such a state of things, that the appellee wished to have the benefit of their superior intelligence and advice, and not when it could be had, to trust to the discretion of the master, who could not be so well informed. If there was a port on the continent of *Europe*, in the *North Sea* or *Baltic*, open to the admission of the appellee's goods, the master was bound to go there, before freight could be earned; it was the contract of the owners with the appellee, and he had a right to stand upon it. And the master could not entitle them to freight by going to *England*, and there delivering the goods, either contrary to, or without the advice of *Messrs. Parish & Co.* unless he was cut off from all communication with them by the unsettled state of affairs at the time. What then was the course pursued by the master? In his letter to *Messrs. Parish & Co.* of the 13th of July, 1810, he informed them of the capture of the ship by a *Danish* privateer, and that he was taken into a *Danish* port for adjudication; spoke of his having property on board belonging to the appellee, and asked advice and information, but said nothing of the consignment of the goods to them. That letter does not appear to have been received. In his letter of the 14th of September, 1810, he informed them, that he had craved their advice in his preceding letter, respecting *his future destination*, but added, that a more extensive knowledge of prize cases induced him to believe, that if he was in possession of it, it would be of no advantage. Thus virtually dispensing with any advice from them upon the subject; and upon that assumption he seems to have acted, as there is nothing to show, that he ever afterwards sought any advice or information from them in relation to the destination or disposition of the appellee's goods. In that letter he advised them, that a considerable part of the cargo was to their address, without saying to whom it belonged, or giving any account of the amount or character of the goods. On the 13th of October, 1810, he received an answer from them to his letter of the 14th of September, dated the 2d of October, and received in eleven days after it was written. In this letter, they requested him to inform them, who were the shippers of the consignment to their address, and to forward any letters he might have for them, with any other information that might be useful, suggesting difficulties respecting the future destination of the ship, in the event of her being liberated, but that there was time enough to correspond on that subject, after being informed of the cargo on hand, and at the same time telling him, that several of their friends had proceeded from *Gottenburg* to *Carlsham*, there to unload their cargoes, &c. On the 14th of October he acknowledged the receipt, on the preceding day, of that letter, informed them for the first time of the quantity and description of the goods to their address, and that they were shipped by the appellee, and that he was in daily expectation of his sentence, of which they might depend upon being immediately advised. On the 30th of October they answered that letter; told him they were anxiously awaiting the result of the proceedings in the court of prize; referred him to the public papers for the late *French* and *Danish* decrees, and told him that under existing circumstances, it was difficult to point out a proper port of discharge, so many changes were taking place, but that if any further alterations should take place, they would keep him informed. In his letter of the 8th of November, 1810, he advised them of the liberation of the vessel, and the restoration of his papers, on the 5th of the same month, by sentence of the prize court, and of his determination to discharge the cargo at *Flekkefiord*, where the ship was then lying. Thus announcing his determination not to seek or await any instructions or advice from them, relative to the disposition of the cargo, but to act upon his own judgment. And on the 10th of the same month, he acknowledged the receipt of their letter of the 30th of October, eleven days after it was written; and after regretting that it contained no information to induce him to alter his determination to unload at *Flekkefiord*, told them he intended to commence doing so on the Wednesday following—and afterwards without consulting them on the subject, or giving them any intimation of his intention to do so, sailed for *Hull*, where he unloaded the cargo.

Resting here, there is not a tittle of evidence to show a compliance by the master, with his instructions; but on the contrary, the whole of it has the opposite bearing. In his first letter to *Messrs. Parish & Co.*, he informs them of the capture of his ship; in his second he tells them, that his knowledge of prize cases, induces him to believe that their advice in relation to his future destination, would be of no advantage to him; and in his third, he for the first time, (and that only in compliance with their request, contained in their answer to his second letter,) discloses to them, the quantity and description of the goods to their address, and the name of the shipper—and although requested in the letter to which that is an answer, to forward to them any information that might be useful, and also told that it will be time enough to correspond on the subject of his future destination, after they should be informed by him of the goods he had on hand, he neither communicates to them the nature of his instructions, nor asks their advice. In his fourth, he announces to them the restoration of the ship and papers, and that no appeal was made, and also his determination to discharge the cargo at *Flekkefiord*. But it does not appear, that he forwarded the letters of instruction to them, from the appellee with which he was entrusted, notwithstanding his saying, that the papers were restored to him on the 5th of November, and their request in their first letter, that he would forward any letters he might have for them; and in his last letter to them, he reiterates his determination to unload at *Flekkefiord*, and tells them that he intends commencing it on the Wednesday following, though they had before suggested to him, that some of their friends had proceeded from *Gottenburg* to *Carlsham*, there to unload their cargoes; and speaking of the frequent changes that were occurring, had promised in their letter of the 30th of October, to keep him informed of any changes that might take place in the state of affairs. And with a view to those frequent changes, that very unsettled state of affairs it was, that the shipment was made, and his instructions given him to consult with, and be governed by the advice of the *Messrs. Parish & Co.* But having as early as the 14th of September, 1810, brought his mind to the conclusion, that the advice of *Messrs. Parish & Co.* would be of no service to him, and acting upon that assumption, he manifestly determined, not to throw himself upon them for information or instructions, but to take the disposition of the cargo upon himself. And he did do it, regardless of their suggestion, that some of their friends had proceeded from *Gottenburg* to *Carlsham*, to land their cargoes, their promise to keep him informed of any changes that might take place in the state of affairs, and their intimation of a correspondence to be opened, after they should be informed by him of the goods on hand, all which was before the vessel had been liberated; his advice of which event was accompanied by the information, that he had determined to discharge the cargo at *Flekkefiord*, and followed two days after by the information, that he should begin unloading the Wednesday following, without asking any advice or information on the subject, which, added to his having withheld a disclosure of his own instructions, and neglected to forward the letters of instruction to them from the appellee, and thus kept them in a state of ignorance that he was placed under their direction, was calculated to induce the belief, that he was acting by authority, seeing that he withheld himself from all further communication with them, and sufficiently accounts for their not writing to him again, in the absence of proof of any other cause.

If at the time of the liberation of the *William Wilson*, all the ports of the continent of *Europe* on the *North Sea* and *Baltic*, were, in fact, closed by municipal regulations, against the admission of a vessel and cargo in her predicament, and she was expelled from the ports of *Norway*, by the orders of the *Danish* government, so suddenly after her liberation, as not to allow time for a further correspondence between the master and *Messrs. Parish & Co.*, and he was prevented from communicating with them, by the situation of affairs, and not by his own act or conduct; he would, under such circumstances, to be found by the jury, and by force of his letter of instructions, have become the special agent of the appellee, and by proceeding to *Hull*, in *England*, and there accepting that part of the cargo which belonged to the appellee in fulfilment of the contract, have entitled the owners to freight, and the court should have so instructed the jury, if there had been any evidence in the cause to justify such a direction. But we can discover no such evidence.

If it should be conceded that, that part of the deposition of *James Dooley* relied upon for that purpose, was legal evidence, which is not very clear, being only evidence of what he heard a pilot say, there is nothing in it to sustain such a direction. The most that can be made of *Dooley's* testimony is, that about the 10th of December, 1810, the master went on board the ship accompanied by a pilot, who directed her to be got under way, and said he had received orders from a custom house officer to take her to sea that night. Now there is nothing in this, tending in the slightest manner to prove, that the ship was expelled from the port of *Norway* by the orders of the *Danish* government so suddenly after her liberation, as not to allow time for a further correspondence between the master and *Messrs. Parish & Co.*, and that he was prevented from communicating with them by the situation of affairs, and not by his own act or conduct. The ship was liberated, as is shewn by the letter of the master himself, of the 8th of November, 1810, on the 5th of that month, and according to *Dooley's* deposition, was taken to sea by the pilot about the 10th of *December*, thirty-five days after her liberation; during the whole of which time, she was permitted by the state of affairs, to remain at *Flekkefiord.* It is also shewn by the letters of the master, that in answer to letters addressed by him to *Messrs. Parish & Co.*, after the capture and during the detention of the ship, he received two letters from them, in eleven days after their respective dates. *Dooley's* testimony then, so far from tending to prove, or affording the slightest ground for the inference, that the ship was expelled from the ports of *Norway* so suddenly, as not to allow time for a further correspondence between the master and *Messrs. Parish & Co.* if it proves any thing, clearly establishes the contrary hypothesis, by shewing that she was permitted to remain at *Flekkefiord* thirty-five days after her liberation; quite long enough for a communication with *Messrs. Parish & Co.*, as it only required eleven days for a letter to pass between them—during which time, the master, if he had been so disposed, might, as it was his duty to do, have opened a correspondence with them, relative to the disposition or further destination of the appellee's goods. And so far from there being any evidence to show, that his not seeking the advice of *Messrs. Parish & Co.*, was owing to the situation of affairs, which prevented his communicating with them, the whole of the evidence lies the other way. His telling them in his second letter, that their advice would be of no service to him, and never afterwards seeking it; and his following up that with his letters of the 8th and 10th of November, in the first of which he advises them of the liberation of the ship, and his determination to land the cargo at *Flekkefiord*, and in the other, of his intention to commence unloading on the Wednesday following; and the evidence of *Dooley*, that in the month of *October* or *November*, before the vessel was released, he heard him and *Thomman*, the supercargo employed by the other shippers, say, that they had united in the determination to proceed to *Hull* in the event of the liberation of the ship, with the additional circumstance, that he made no effort to obtain their advice, during the thirty-five days that the ship was permitted to remain at *Flekkefiord* after her liberation, tend strongly to prove his fixed determination, not to submit himself to their directions, but to act upon his own judgment and responsibility. The hypothetical direction, therefore, which was asked for by the prayer set out in the fourth bill of exceptions, was properly refused, being an abstract proposition, not arising out of the evidence in the cause.

Whether the ship owners were, under the circumstances of the case, entitled in equity and good conscience, to retain the money received on account of freight, was clearly a question not to be left to the jury, but proper only to be decided by the court.

We concur, in opinion, with the court below, on the second, third and fourth bills of exception, but dissent from the opinion expressed in the first exception, and REVERSE THE JUDGMENT AND AWARD A PROCENDO.

BOWIE, use of LADD, *et al. vs.* DUVALL.—*December*, 1829.

The statute 3*d and* 4*th Anne*, *Ch.* 9, declares that promissory notes shall be assignable or endorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and power is by the same statute given to endorsees, to maintain actions against the drawers, or prior endorsers of such notes, in the same manner as in cases of inland bills of exchange.

By this statute, bills of exchange and promissory notes are placed on the same footing, and the law applicable to bills, is in general applicable to promissory notes.

When a bill of exchange is endorsed in full, all the legal interest is transferred to the endorsee, and having the legal interest, he alone is qualified to maintain an action on such bill. He cannot use the name of the payee, because the payee having transferred his interest, can have no competency to maintain an action.

So where it appeared that the note of the defendant, payable to B or order, had been endorsed as follows, "I assign the within for value received, to L;" signed B, but which endorsement was erased just before the jury was sworn; it was held that an action in the name of B, originally instituted for the use of L, could not be maintained, upon the note, as there was no evidence from which the jury could infer that the payee and plaintiff was the holder of the note; neither could an action be maintained on the money counts, although there was proof of an express promise to pay the sum demanded in such suit, as that must be considered as enuring to the benefit of him who had a right to the note.

If a note duly endorsed in full, should, in the regular course of commercial dealing, come back to the hands of a prior endorser, or of the payee, it would be competent for such person as the holder, to strike out the endorsement, and sue in his own name.

English decisions made since the revolution, have no authoritative force here.

In an action against the maker of a note, payable at the house of the payee and plaintiff, on a certain number of days after date, no demand of payment is necessary to be averred or proved.

APPEAL from *Prince George's* County Court. This was an action of *assumpsit*, brought by the payee against the maker of a promissory note. The declaration contained a count on a note drawn on the 4th of September, 1821, by the appellee, (the defendant in the court below) for $1387 65, payable sixty days after date, to the appellant (the plaintiff in that court) or order; and also the common money counts. The general issue was pleaded.

1. At the trial, the plaintiff offered in evidence the following promissory note:

"$1387 65 *Prince George's* County, Sept. 4, 1821.

Sixty days after date, I promise to pay *Washington Bowie*, or order, thirteen hundred and eighty-seven dollars and sixty-five cents, for value received, and payable at the house of *W. Bowie.* *John Duvall.*"

The signature of *John Duvall* thereto, being admitted to be in the hand writing of the defendant. The defendant then offered in evidence, that the said note had been specially endorsed by the plaintiff as follows: "I assign the within for value received, to *John H. Ladd & Co.* *Washington Bowie.*"

Alexandria, 22d October, 1822.

The signature of the plaintiff being admitted, the whole of the said endorsement was erased just before the jury was empanneled. The defendant further proved by the docket entries, that the suit was originally instituted for the use of *John H. Ladd & Co.* The defendant then prayed the court to instruct the jury that the plaintiff was not entitled to recover. Of which opinion the court [*Stephen*, Ch. J. and *Key* and *Plater*, A. J.] were, and so instructed the jury, there being no proof offered that *Washington Bowie*, the legal plaintiff, ever had actual possession of the note, after the special endorsement, except that the note was filed in the cause. The plaintiff excepted.

2. The defendant then, on the above evidence, prayed the court to instruct the jury, that as the plaintiff had not averred in his declaration, that the amount of the said note was demanded by him at the house of *Washington Bowie*, agreeably to the

terms of said note, and no proof of a demand was given to the jury; the plaintiff was not entitled to a verdict. And the court being of that opinion, so instructed the jury. The plaintiff excepted.

3. In addition to the above evidence, the plaintiff proved by a competent witness, that after the institution of this suit, the defendant, in conversing with the witness relative to this suit, stated that he was making exertions to pay off the suit against him, and that he could easily do so if he was not forced to sell his property, and that he only wanted time. That he never, in any numerous conversations to the same effect, intimated to the witness that he had paid the note, or had any defence whatever, except once, when he then stated (after the witness had refused to grant him any indulgence) that he intended to dispute the claim, and that his counsel had been so instructed. The witness also stated, that the defendant, in April, 1825, and during the term of *Prince George's* County Court, inquired of the witness the number of the case on the docket, and asked the witness, if he believed the court would continue its session until the case should be reached, and then said that if a judgment should be entered, he hoped the witness would give him a stay of execution. At this time the defendant did not say that he had any defence against the claim. The witness further stated that his impression is, that the defendant, at the time he asked for a stay of execution, was willing to have confessed a judgment. The plaintiff then prayed the court to instruct the jury, that upon this evidence, if believed by the jury, the plaintiff is entitled to recover the amount of said note. But the court refused to give such instruction; and were of opinion, and so directed the jury, that so long as the endorsement aforesaid remained on the note, a suit could not be brought on the said note in the name of *Washington Bowie.* The plaintiff then prayed the court to instruct the jury, that if the note was endorsed and delivered to *John H. Ladd & Co.* by *Washington Bowie*, that it was competent for *John H. Ladd & Co.* the endorsees, to have this suit brought in the name of *Washington Bowie*, for their use, and to authorize the striking

out the endorsement to them for that purpose. And that in this case, if the suit was so brought by *John H. Ladd & Co.* then the endorsement being struck out after the suit was brought, the plaintiff is entitled to recover. Which instruction the court refused to give. The plaintiff then prayed the court to instruct the jury, that if the jury believe from the evidence, that after the suit was brought, the defendant acknowledged the justice of the claim, and promised to pay it, or confess judgment, then such acknowledgment is evidence under the money counts; and also of the plaintiff's right to recover as the holder of the note. Which instruction was also refused by the court. The plaintiff then prayed the court to instruct the jury, that if they believe from the evidence, that after this suit was brought, the defendant acknowledged the justice of the debt for which he was sued, and promised to pay or confess judgment, then such acknowledgment is evidence under the money counts. Which instruction the court also refused to give. The plaintiff excepted to all the refusals and opinions of the court. Verdict and judgment for the defendant; and the plaintiff appealed to this court.

The cause was argued at June term, 1828, before BUCHANAN, Ch. J. and EARLE, ARCHER and DORSEY, J.

F. S. Key and *J. Forrest* for the appellant. On the *first* bill of exceptions, they cited 2 *Phill. Evid.* 29, (*note a.*) 11, (*note c.*) *Dugan vs. United States*, 3 *Wheat.* 173. *Chitty on Bills*, 150 (*note b.*) *Biddle vs. Gray, et ux.* 2 *Harr. & Johns.* 328.

On the *second* bill of exceptions, they cited *Rowe vs. Young*, 6 *Serg. & Lowb.* 53. *Rhodes vs. Gent.* 7 *Serg. & Lowb.* 84. *Bank of the United States vs. Smith*, 11 *Wheat.* 172. *Wolcott vs. Santvoord*, 17 *Johns. Rep.* 248. 1 *Chitty's Plead.* 263, 264. 3 *Chitty's Plead.* 4, (*note a.*)

J. Johnson and *Stonestreet* for the appellee. On the *first* bill of exceptions, they cited *Dugan vs. United States*, 3 *Wheat.* 172. *Chitty on Bills*, 150, (*note b.*) *Clark vs. Pigot*, 1 *Salk.* 126. *Theed vs. Lovell*, 2 *Stra.* 1103. *Kiersted vs. Rogers & Garland*, 6 *Harr. & Johns*, 282.

On the *second* bill of exceptions, they cited *Wolcott vs. Santvoord*, 17 *Johns. Rep.* 254. *Bowes vs. Howe*, 1 *Serg. & Lowb.* 8. *Trecothick vs. Edwin*, 2 *Serg. & Lowb.* 470. *Gammon vs. Schmoll*, 1 *Serg. & Lowb.* 128. *Rowe vs. Young*, 6 *Serg. & Lowb.* 105. *Rhodes vs. Gent.* 7 *Serg. & Lowb.* 84.

Archer, J. delivered the opinion of the court.

The statute *3d & 4th Anne, ch.* 9, declares that promissory notes shall be assignable or endorseable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and power is by the same statute given to endorsees to maintain actions against the drawers, or prior endorsers of such notes, in the same manner as in cases of inland bills of exchange.

By this statute bills of exchange and promissory notes are placed on the same footing, and the law applicable to bills is in general applicable to promissory notes.—*Chit. on Bills*, 335.

When a bill of exchange is endorsed in full, all the legal interest is transferred to the endorsee, and having the legal interest he alone is qualified to maintain a suit. He cannot use the name of the payee, because the payee having transferred his interest, can have no competency to maintain an action.

It is true, that if a note duly endorsed in full, should in the regular course of commercial dealing, come back to the hands of a prior endorser, or of the payee, it would be competent for such person as the holder to strike out the endorsement, and sue in his own name. These positions are fully maintained by the Supreme Court of the United States, in the case of *Dugan vs. The United States*, 3 *Wheat.* 183, where it is said "that if any person who endorses a bill of exchange to another, whether for value or for purposes of collection, shall come to the possession thereof again, he shall be regarded as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover notwithstanding there may be on it, one or more endorsements in full, subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees, whose names he may strike from the bill, or not, as he pleases."

The correctness then of the opinion of the court below, as expressed in the first bill of exceptions, must depend upon the fact, whether there was any evidence from which the jury could infer, that *W. Bowie* the payee and legal plaintiff in this case, was at the time of the institution of this suit, the holder of the note upon which this action was brought. The suit is in the name of the payee, and is marked to the use of *Ladd & Co.*, to whom the endorsement had been made in full, before the commencement of the suit. Either *Bowie* or *Ladd & Co.* filed the note and directed the use. If *Bowie* filed the note with its special endorsement, and directed the use, it was evidence not to be disregarded, that *Bowie* meant the assignment should be perfected. He had in fact by so doing delivered it to *Ladd & Co.;* and *Ladd & Co.* must be considered in the absence of evidence to the contrary, as assenting to the transfer, it being for their benefit. Nor could *Bowie*, after the endorsement and the direction to enter it for the use of *Ladd & Co.*, although the legal plaintiff, strike out the use, or interfere with the endorsement without the consent of *Ladd & Co.* It is therefore manifest even in this view of the case, that *Bowie* would have parted with his right, was no longer a holder of the note, and could not maintain a suit. If on the contrary, *Ladd & Co.* filed the note with the assignment, then the transfer was clearly complete, and the suit should have been brought in their names, as they were legally entitled to the note, and were the holders thereof. There being then no evidence from which the jury could infer that the payee and plaintiff was the holder of the note, he was not entitled to recover upon the evidence stated in the first bill of exceptions.

The views which have been submitted of the law arising out of the first bill of exceptions, disposes of the two first prayers in the third exception.

We also concur with the court below in the opinions expressed by them on the third and fourth prayers in the third exception. If the right was in *Ladd & Co.* there could be no recovery by the plaintiff on the money counts; the promise to pay must be considered as enuring to the benefit of him who had a right to the note, and if the right to the note was in *Ladd & Co.*, any promise to *Bowie* was without consideration and void. Nor could the promise to pay or confess judgment, if the jury had believed in the existence of the promise, have enabled *Bowie* to have recovered as holder, because the right by the endorsement was transferred to *Ladd & Co.* who are to be considered as the holders, in the absence of testimony, showing that the note had got back to the hands of *Bowie*.

In the second bill of exceptions, the court decide that no recovery could be had by the plaintiff, because he had not averred in his declaration, that the amount of the said note was demanded by him at the house of *Washington Bowie*, and because no proof was given to the jury of a demand. The general doctrine that where a note is payable on demand, at a particular place, the averment of a demand and proof of notice is necessary, seems to be well established law in England, as will be seen by consulting the opinions of the twelve judges, delivered in the case of *Rowe and Young*, 2 *Broderip & Bingham*, even in the case of a suit against the maker of a note. So too it was settled by that decision, that if an acceptance was made payable at a particular place, the averment of a demand and proof thereof was considered indispensable to a recovery, because in each case the place of payment according to the idea of the judges, is made part and parcel of the contract. Such, however, were the inconveniences of the rule, that Parliament, by the statute of 2 *Geo. IV. ch.* 78, declared that an acceptance at a particular place, should have the effect of a general acceptance, unless the acceptance was made payable at a particular place, and *not elsewhere*. These English decisions, which have in part been abrogated by the Legislature, as departures from commercial usage and policy, and, where, not interfered with by them, have been considered by some of her most eminent jurists, as departures from the law, [vide *Mr. Justice Bayley's* and *Mr. Justice Abbot's* commentary on *Sanderson vs. Bowes*, 2 *Brod. & Bing.* 180,] have no authoritative force here, because the cases in which these doctrines have been settled, have been adjudicated since our revolution, and are against all the analogies of the law, as was clearly demonstrated by *Bayley Justice*, in his argument in *Rowe and Jefferys*, and by *Ch. J. Spencer*, in *Wolcott vs. Van Santvoord*, 17 *Johns. Rep.* 250.

The Supreme Court of the United States, in the case of the *United States Bank vs. Smith*, 11 *Wheat.* 175, after adverting to the *British* decisions on this question say, that a contrary opinion has been entertained in the courts of this country, that a demand on the maker of a note, or the acceptor of a bill, payable at a specific place, need not be averred in the declaration, or proved at the trial. That it is not a condition precedent to the right of recovery, and they intimate their opinion to be in accordance with such determinations. In *New York*, the law has been considered as settled in the same way, from the case of *Foden vs. Sharp*, 4 *Johns. Rep.* 184, decided in the year 1809, where the court say "the holder of a bill of exchange need not show a demand of payment of the acceptor, any more than of the maker of a note;" and in 17 *Johns. Rep.* 248, the court say, in commenting on this case, that such was the doctrine of the *English* courts at that time, and they there decide that a demand at the place where accepted, is not a condition precedent to the right to recover, and that of course it need not be averred in the declaration.

In deciding in this case, that no demand was necessary to be made, we shall contradict no decided case in this country, which has fallen under our observation. The note it must be recollected, is *payable at the house of the payee and plaintiff*, and is not payable on demand there, but sixty days after date. In 11 *Wheat.* 171, *United States Bank vs. Smith*, it is decided, that if the bank at which a bill or note is payable, be the holder of the bill or note, no demand will be necessary, but an examination into the state of the accounts of the maker in bank, to see whether he has deposited funds, is all that is necessary to be done, to enable the party to recover. The same decision has been made in 12 *Mass.* 404, with the exception that no examination of the books was required. In *New York*, *Caldwell vs. Cassedy*, 8 *Cowan*, 271, it was decided, that the place does not enter into the essence of the contract, unless the promise is to pay *on demand at that place*, and that consequently where the note is made payable at a particular place merely, no demand is necessary to be averred. This decision meets the present case. But we would not wish to be understood as deciding this case, upon so subtle a distinction, but upon the broad ground, that when the suit is against the maker of a promissory note, no demand is necessary to be averred, upon the principle, that the money to be paid is a debt from the defendant, that it is due generally and universally, that it will continue due, though there be a neglect on the part of the creditor, to attend at the time and place, to receive or to demand, that it is matter of defence on the part of the defendant, to shew that he was in attendance to pay, but the plaintiff was not in readiness to receive, which defence generally, will be in bar of damages only, and not in bar of the debt.

It is stated in *Sanderson vs. Bowes* (14 *East. Rep.* 500) that the place of payment is inserted in promissory notes as a matter of convenience to the makers, for it would be very inconvenient if they should be compelled to answer them every where, when it is notorious that they have made provision to answer them at a particular place. If such be the practice in *England*, where the makers of notes have generally their bankers, with whom funds are set apart for the special payment of their notes, the construction which prevails there, upon this clause of such an instrument, may have grown out of the commercial usages of the country. But our usages here would seem to lead to a different construction, for it is a matter of notoriety, that parties to this commercial instrument generally collect them in our cities, through the medium of the banking institutions; and they are most frequently made payable there, or at a particular place, not for the convenience of the drawer, but for the benefit of the holder, that his collection may be facilitated. And this case furnishes an illustration of the fact, for it is perfectly obvious that the home of the payee was the place of payment, here to suit the convenience of the payee, not the maker.

We concur with the court below, in every direction given by them to the jury, but disagree with them in the opinion expressed in the second bill of exceptions.

JUDGMENT AFFIRMED.

WILLIAMSON *vs.* CARNAN.

AFTER an injunction had been granted, prohibiting the defendant from obstructing a public road, *the Commissioners of Baltimore County* authorised the same road to be shut up. The defendant, who was the owner of the land over which the road passed, without moving, or waiting for a dissolution of the injunction, shut it up. The Chancellor excused this violation of the injunction, upon the ground that the defendant had misapprehended his rights; but ordered him to place the road in its former condition; this not being done, the defendant was brought before the Chancellor by attachment. The injunction was then ordered to be continued until final hearing, or further order; and the defendant to remove the obstructions, and for his contempt in not removing them since the previous order, was fined. From these proceedings the defendant appealed. Upon a motion to dismiss the appeal, it was held, that the order of the commissioners directing, and authorising, the old road to be shut up, placed the premises over which it formerly run, under the control of the defendant, and gave him the same right of user of the land of that road, that he had of the rest of his estate; and that the subsequent orders of the Court of Chancery, so affected his rights and interests therein, as to form a fit subject of appeal.

Where the Chancellor entertains a doubt as to the propriety of granting an injunction at all, or where, when granted, it operates in restraint of public commissioners for the opening a road, street, or the like; or it altogether stops, retards, or embarrasses the operation of a large manufacturing establishment, or restrains a public ferry, in these and some other cases of a very peculiar nature, it has been the practice in the first instance, or on application, to appoint a very early day for the hearing of the motion of a dissolution of the injunction, and that too, either with or without answer. PER BLAND, CHAN'R.

But where upon a defendant's own showing, the injunction operates in restraint of a right, which he has but recently acquired, or has not long decidedly and exclusively enjoyed, and there is nothing peculiar in the case, so as to require a departure from the general rule, it must, as in other cases where individuals only are restrained, take the course of the court. IB.

Whether an inferior tribunal with jurisdiction over a given subject, has proceeded to exercise it upon such subject correctly, or erroneously, or has in any respect neglected, or disregarded, its prescribed modes and forms, is not for the Chancellor to determine, where he has no revising or superintending authority over it. Ib.

Chancery will restrain a party from doing an act injurious to an individual, or which may be prejudicial as a public nuisance, pending any judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness is to be determined. Ib.

Appeals from sundry orders of the Court of Chancery. The bill of complaint in this case, was filed on the 12th of May, 1826, in *Baltimore* County Court, sitting as a court of equity, by the complainants, (now appellees,) against the defendant, (the appellant,) and afterwards, under the act of 1824, *ch.* 196, at the instance of the defendant, was transmitted to the Court of Chancery. The bill states, that a certain road or highway in *Baltimore* county, usually known by the name of the *Garrison Forest Road*, has been a public road of *Baltimore* county, for upwards of fifty years, and for many years past has been duly and legally recognized as such, on the records of the Levy Court of said county, and has for a long time been used and travelled by the complainants, (residents and landholders in the said county,) and other inhabitants of the said county, as their nearest and most convenient road and way, from their respective farms and places of residence in the said county, to the city of *Baltimore*, the principal and most important market in the said county. That on the 18th of April, 1825, *John M. Wyse*, (one of the complainants,) was duly appointed supervisor of the said public road, by the Levy Court of the said county, as by the warrant exhibited. That the said *Wyse* duly accepted the said appointment, and took upon himself the performance of the duties thereof, and that he hath never resigned his said appointment, nor hath any other person been appointed supervisor of the said road, or any part of it, of which he was so appointed; and as such supervisor, it was, and is his duty to clear, amend, and keep in good repair, the said public road, and not to permit or suffer any fallen trees, or other obstructions, within his power, to remain in or across the said road, whereby any wagon, &c. may be obstructed for the space of two days together. That the justices of the Levy Court of the said county, without any such application, proceedings or proof being made to and before the said Levy Court, as is and are required by law, and by the acts of Assembly in such case made and provided, and without any lawful authority or good right so to do, on the 10th of April, 1826, made and passed an order of the said Levy Court, to close and shut up a part of the aforesaid public road, to wit, all that part between a point or place near to a stream called the *Western Run*, where a new road has been commenced, and the *Baltimore* and *Reister's Town* Turnpike Road, nearly opposite to *John Armstrong's* gate, in the said county; and although the complainants have applied for and obtained, and caused to be duly served, a writ of *certiorari* directed to the said justices of the Levy Court, commanding them to certify the record of the said order, and of the application and other proceedings on which the said order was made, with all things touching the same, to the judges of *Baltimore* County Court, as a court of common law, for the purpose of having the same heard, adjudged and determined as to law and justice, shall appertain; yet, so it is, that a certain *David Williamson*, junior, (the defendant and appellant,) well knowing that the said order of the Levy Court was irregularly and improperly passed, but pretending and alleging that the land over which the said road passed, belongs to him, although no part of it had ever been in his possession, and without any good right or lawful authority so to do, has proceeded by himself and his agents and servants, to obstruct and shut up the part of the said public road described in the writ of *certiorari* aforesaid, by erecting fences and walls of wood and stone, and placing other obstructions on and across the said road, so as to entirely stop and prevent the complainants from travelling on or using the same, as they were heretofore accustomed, and yet have a right to do; thereby causing great inconvenience and injury to the complainants. That the said *Wyse*, when in pursuance of his duty as supervisor of the said road, was proceeding to remove the said fences and other obstructions, from and out of the said road, and clear the same, as by law directed, the said *Williamson* forcibly and with violence, prevented him from opening and clearing the said road, and wholly refused, and still refuses to permit him to perform his said duty as supervisor, and threatens to use personal violence to and against him, and every other person who shall attempt to open and clear the said road, or to remove any of the fences or other obstructions therefrom, or to travel on or over the said part of the public road so by him obstructed. All which actings, &c. The bill then enumerates certain interroggatories to be answered by the said *Williamson*, and concludes with a prayer for a writ of injunction, to be directed to the said *Williamson*, his counsellors, &c. commanding and enjoining him and every of them, that he and they do absolutely desist from further obstructing and continuing to obstruct and shut up, all that or any part of the public road called the *Garrison Forest Road*, as heretofore used and travelled on, &c. and particularly that part of the said road between, &c. and also that he and they do absolutely desist from preventing by force, &c. *J. M. Wyse*, the supervisor of the said road, or whosoever else shall be appointed supervisor of the said road, his agents, &c. from removing all obstructions whatever, from and out of the said road, and clearing, opening and repairing the same; and from preventing or hindering the complainants or their servants, or any other citizens of this state, from travelling and using the said road as a public highway, in the same manner as it has heretofore been used, until the further order of the court in the premises; prayer also for a *subpœna* to the said *Williamson*, &c.

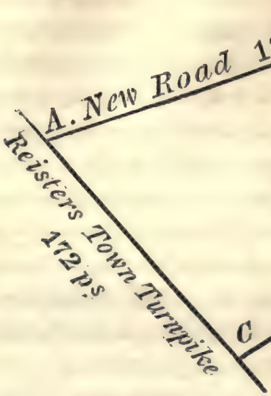
The writ of *injunction* and *subpœna* were ordered, and issued accordingly, and were duly served by the sheriff of *Baltimore* county.

The *answer* of the defendant, filed on the 13th of May, 1826, states, that he is the owner and occupier of divers tracts or parts of tracts of land, adjacent to each other, situate, lying and being in *Baltimore* county, and binding in part on the eastern side of the *Baltimore* and *Reister's Town* Turnpike Road, between the sixth and seventh mile stones, and that the road mentioned in bill of complaint of the complainants, did heretofore pass transversely through the lands of the defendant to the said Turnpike Road, above the sixth mile stone, and the defendant conceiving himself greatly aggrieved and injured by the said location of the said road, made known to his neighbours, and amongst others, to several of the complainants, and especially to *John M. Wyse*, that he intended to make application to the Levy Court of *Baltimore* county to alter the location of the said road; and that on or about the 10th of Ferbuary, 1823, the said *Wyse*, acting for and on behalf of the defendant, wrote and posted up the notice of an intended application to the Levy Court aforesaid. The answer then stated that affidavits were made by certain persons, that copies of the said notice were posted up at certain houses to which public resort was had, near the road in question, which affidavits he exhibited. That on the 21st of February, 1823, the defendant made application, in writing, to the Levy Court aforesaid, that the said road might be altered; and that the application was presented by the said *Wyse* to the said court on behalf of the defendant, he the said *Wyse*, at the same time, urging to the court the propriety of granting the said application to the defendant, who was then absent from the state on business. That at March term, 1823, the said *Carnan*, &c. joint complainants in this cause, and a certain *T. Ritter*, by their petition in writing, addressed to the Levy Court aforesaid, set forth that they were not opposed to the private interest of the defendant in the said projected alteration; but asked the said court to require adequate security on the part of the defendant, to make the new piece of road every way good and substantial. That after the return of the defendant, on the 21st of July, 1823, he procured from the said *Wyse* and one *T. H. Belt*, then living in the neighbourhood, a petition in writing, setting forth that it would be a public benefit to have the said road altered; and praying that the petition of this defendant might be granted. Which said petition was presented to the said Levy Court. That on the 11th of August, 1823, the Levy Court caused a commission to be issued to *Caleb*

Merryman, *&c.* three respectable free holders of the county, to locate a road as prayed for by this defendant. That the said commissioners met on the premises pursuant of the said commission; that on the 1st of September, 1823, the said *Jehu McAllister*, *&c.* three of the complainants, and others being then present, made a new location to the said road and caused a plot thereof to be made, and made return of all proceedings to the said Levy Court; and that on the 10th of April, 1826, the Levy Court passed an order that "all that part of the old *Garrison* road leading through the land of *David Williamson*, jun. commencing at the letter B, (marked on the plat returned by the commissioners heretofore appointed by this court to alter and straighten and amend the same) and from thence to the letter C, at the *Reister's Town* Turnpike road, also marked on the said plat, be shut up and closed; the same having been rendered useless by the alteration and amendment made on the said road by the said commissioners, adopted and approved by this court." That the said road so altered as aforesaid, is in every respect a shorter and better road than the old road. That immediately on the passage of the said order last mentioned, by the Levy Court, this defendant, as he conceived he had a right to do, proceeded to connect his fences and enclose his lands, and had the same actually enclosed on the 10th of April last mentioned; and that since that time he has removed a part of the inner fence, whereby the bed of the old road is thrown into a field now in actual cultivation. He admits that on the 18th of April, 1825, the said *Wyse*, was appointed supervisor as hath been stated; but that the said appointments are annual appointments, and that it hath not been renewed; and that under the said order of the 10th of April last past, all that part of the said road as laid down upon the said plat from B to C, which passed through the lands of the defendant, ceased to be a public road, if the same ever was a public road. The defendant charges it to be true that neither the public good, nor their own advantage, but private malice and resentment produced by other causes than the supposed injury from the alteration of the said road, have induced the said *Wyse* and some of his confederates to make this attempt to injure the defendant. That each and every one of the complainants hath other and better roads to mill, to market and to church, than the road heretofore passing through the farm of the defendant. He denies that the said road has been used as a public road for upwards of fifty years, or that there is any record in the Levy Court calling for a public road leading through the lands of this defendant. He admits that an application hath been made for a *certiorari* as hath been stated; but he saith that the road passing through his farm had been closed up and a part of the inner enclosures removed, before any application for the same. That the re-opening of the same, particularly at this time, would be attended with great and irreparable loss and injury to the defendant. He admits that after he had closed the said road as aforesaid, the said *Wyse*, not in pursuance of his duty of supervisor, as is falsely charged in the complainants bill, he the said *Wyse* at the time well knowing of the order of the Levy Court of the 10th of April last, under and from whom he derived his said pretended authority, but for the sole purpose of gratifying his malice and resentment against the defendant, did attempt to pull down and remove the fence of the defendant; and the defendant possessing the power, and feeling himself justified in resisting such lawless invasion of his rights, did prevent the said *Wyse* from passing over and through his farm. That no person except the said *Wyse*, and *M. Turner* (also one of the complainants,) which said *Wyse* is not at this time a freeholder in the said county, have ever attempted or requested permission to pass through the farm of the defendant—another and a better road having been previously provided. He admits he has closed the road referred to from B to C as designated on the plat. He also admits that for some years, but cannot state how many, the said road had been occasionally used by the neighbourhood; and that he claims title to the land over and to the land on both sides of which the said road passes, by purchase, and has been in possession thereof several years. He denies all and all manner of combination, &c. *Prayer* that the said injunction may be dissolved, &c.

The defendant exhibited the several documents, &c. referred to in his answer.

THE PLAT REFERRED TO.



The proceedings having been transmitted to the Court of Chancery as before mentioned, the defendant on the 15th of May, 1826, by his petition to the Chancellor, stated, that the continuance of the injunction heretofore issued will be attended with great and irreparable damage, loss and injury to the petitioner. He therefore prays, that the Chancellor will pass an order limiting an early day for the hearing of the motion, (which he had entered on the docket,) to dissolve the injunction.

Bland, Chancellor, 15th May, 1826. In cases where the Chancellor entertains a doubt as to the propriety of granting an injunction at all, or where, when granted, it operates in restraint of public commissioners for the opening a road, street, or the like; or it altogether stops, or retards, or embarrasses the operation of a large manufacturing establishment, or restrains a public ferry, in these and some other cases of a very peculiar nature, it has been the practice in the first instance, or on application, to appoint a very early day for hearing of the motion for a dissolution of the injunction, and that too, either with or without answer. But according to the defendant's own showing, in this case, this injunction operates in restraint of a right which he has but recently acquired, or has not long decidedly and exclusively enjoyed. There being, then, nothing in this case of so peculiar a nature as to require a departure from the general rule, it must, therefore, as in other cases where individuals only are restrained, take the course of the court; and the foregoing petition is hereby dismissed with costs.

Afterwards, on the 25th of May, 1826, the Chancellor, on motion of the defendant, passed an order, that the motion to dissolve the injunction, stand for hearing at the next term, provided a copy of the order be served on the complainants, or their solicitor before, &c. The copy was duly served.

Bland, Chancellor, (September term, 1826.) This case standing ready for hearing, the motion to dissolve the injunction, and the solicitors for each of the parties having been heard, the proceedings were read and considered.

There can be no doubt, from the act of 1821, *ch.* 152, that the Levy Court of *Baltimore* county have the jurisdiction and power of "opening a new road, or of vacating or altering an old road." Whether that tribunal has, in this instance, proceeded to exercise its jurisdiction upon this subject correctly or erroneously; or has, in any respect, neglected or disregarded the prescribed modes and forms, is not for the Chancellor to determine; because he has no revising or superintending authority over it.

The object of the injunction was not to touch or impeach the jurisdiction of the Levy Court; but to stop the further proceedings of the party, upon the ground, that there were some circumstances in the case which showed, that he ought not to be permitted to do the act complained of, until it had been finally directed or sanctioned by that jurisdiction, or superior and controlling authority.

It appears, that the Levy Court, on the 10th of April, 1826, passed an order directing the road in question to be closed; and also, that on the 14th of the same month, the complainants obtained a writ of *certiorari* to remove the proceedings of the Levy Court into the County Court for their revision. It does not distinctly appear, that the order of the Levy Court was of such a nature, that its execution could not be suspended by a writ of *certiorari*, until the matter thereof could be heard and decided upon by the County Court. It is no where in the bill or answer, spoken of or stated to be an order of that character. And whether the County Court have the power to suspend, revise or reverse such an order, is not for this court to determine. That the writ of *certiorari* did issue, has been admitted; and for aught that appears, is still depending. It appears that the defendant did obstruct the old road, while the question for vacating it, was still *sub judice;* after the Levy Court had passed their order, but before it had been affirmed or decided upon by the County Court, to which it had been carried by the writ of *certiorari;* and, therefore, he was properly restrained by the injunction. For although this court has no power to revise the proceedings or to correct the errors of the Levy Court, or the County Court; yet, it will restrain a party from doing an act injurious to an individual, or which may be prejudicial as a public nuisance, pending any judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness is to be determined. If the County Court shall determine upon the return to the writ of *certiorari*, that the order of the Levy Court of the 10th of April, was final and conclusive; or that it be affirmed; or that the writ of *certiorari* be quashed, then the defendant will stand justified under that order, in going on to obstruct and close the old road, in question, so far as it passes over his land; and this injunction must be dissolved. If on the contrary, the County Court shall reverse or annul the order of the Levy Court, the restraint upon the defendant must be continued. It is proper that the parties should be held in their present situation to await that decision.—*Ordered*, that the injunction be continued until the hearing, or further order.

At December term, 1827, the Defendant, by his petition to the Chancellor, prayed leave to amend his answer, &c. But the Chancellor refused the leave, and dismissed the petition. At the same term, the complainants, by their petition, stated that it would appear by the annexed affidavits, that the defendant had totally disregarded the injunction, and caused the road therein mentioned, to be obstructed, &c. Prayer for an attachment against the defendant, and that he may be compelled to place the same road in the same situation as it was previously to his closing the same on the 13th of the present month.

An attachment was accordingly ordered and issued returnable forthwith; and the sheriff returned the said writ, that he had attached the defendant.

At March term, 1828, the complainants again by their petition stated, that the defendant, disregarding the said injunctions, did by his agents, servants and himself, caused the road mentioned in the injunction, to be obstructed on or about the 13th of December last, by causing fences, &c. to be erected, and placing other obstructions on and across the same, &c. as will appear by the affidavits filed on the last term. That although an attachment issued, and was duly served on the defendant, it had not had the effect of causing him to remove the obstructions then existing; but as would appear by the annexed affidavit, he had additionally obstructed the said road, &c. Prayer for an attachment against the defendant, and that he be compelled to place the said road in the same situation as it was previously to his closing the same on or about the 13th of December last.

An attachment was again ordered and issued, returnable forthwith; and was duly served, &c. The defendant appeared and filed his petition, in which he stated, that the proceedings of the Levy Court in reference to the said road, having been set aside by *Baltimore* County Court, upon the hearing and examination thereof, under the writ of *certiorari*, which had been issued, &c. as will appear by a transcript of the proceedings exhibited; not upon the merits of the case, but for defect of form, as will appear by a copy of the opinion of the said court. That the petitioner being advised that, that part of the said road called the *Garrison Forest Road*, mentioned in the proceedings, having become a public road and highway, he, together with other petitioners, taxable inhabitants of the county, made a new application to the Levy Court, to alter and close the said part of the said road; and that the complainants had notice thereof, and attended a meeting of the commissioners appointed under the said application, and opposed the confirmation of the return made by the said commissioners. That on the 13th of December, 1827, an order was passed by the commissioners of the county *to whom the powers and duties heretofore exercised by the Levy Court, have been transferred*, that all that part of the before mentioned road be shut up and closed; and that the petitioner, or any other person or persons, through whose lands the said old road may have been departed from, by such altering, &c. are authorized to shut up and close the same, as by reference to a copy of the said proceedings exhibited will appear. That the complainants had knowledge of the said order of the said commissioners, and that the said order being final and conclusive without appeal, and no writ of *certiorari* having been applied for, and the said road so authorized to be closed, passing transversely through the farm of the petitioner; and the complainants, by the altering of the said road, having another and a better and shorter road, and the petitioner being greatly aggrieved by the passing of the said road through his lands, and conceiving himself fully authorised to do so by the said order, he, by virtue of the said order, and not as he avers, in contempt of the court, did proceed to close the said road; and that he shut up and closed the same without force, &c. and before any attachment had issued against him. That since he has closed the said road, he hath removed his inner fences, and planted an orchard on either side of and through the bed of the said road; and that the removal of his fences will be attended with great and irreparable damage to him. Prayer that the said road may be suffered to remain closed; and that he may be released from custody, and that the attachment may be quashed.

Among the several exhibits filed with the preceding petition, was the following, being the opinion of *Baltimore* County Court, in May, 1827, on deciding on the *certiorari* which had been issued.

Archer, Ch. J. This court assumes to itself no power or authority to review the judgment of the Levy Court, as to the fact, whether the public convenience required the alteration in the road mentioned in the proceedings in this case. *The Levy Court* is the sole and proper tribunal, to which the laws have confided the adjudication of that matter, and doubtlessly, they have upon this point made a correct determination. But whether they have been right or wrong, is not my province to determine. I cannot sit as an appellate court, to review their judgment. The laws in this respect have assigned to me other duties, to the performance of which I proceed. I have carefully examined all the authorities referred to, together with the acts of the General Assembly, conferring powers on the Levy Court, and the constitution and laws giving powers to this court, and will briefly present the conclusions to which I have arrived. It would have been satisfactory to the parties concerned, as well as gratifying to myself, to have presented particularly the reasons by which I have been led to these conclusions; but the pressure of business at the close of the term, gives me scarcely more leisure than is indispensably necessary to examine and adjudge the matter submitted to me. And in this case, I should not have reduced any thing to writing, but from a belief that some of the conclusions to which I have arrived, might, upon future occasions, be useful to the subordinate tribunals, as a guide in similar matters, which might come before them; and at the same time, inform them and others interested, of the powers and obligations of this court, in relation to inferior judicial jurisdictions and their proceedings. In this case the following principles are adjudged and settled by this court.

1. That every inferior jurisdiction, whether created by a public or a private law, is subject to have its proceedings inspected either by appeal or by *certiorari* and *mandamus*, where such jurisdiction acts judicially. 1 *Salk.* 146. 1 *Ld. Raym.* 580. They will be coerced to perform their duties, and restrained and confined within their proper limits as prescribed by law.

2. That where these jurisdictions act in a summary manner, or in a new course different from the common law, a *certiorari* is the peculiar and appropriate remedy; as in such a case, a

writ of error will not lie. *Greenvelt vs. Burwell*, 1 *Salk.* 263. *Com. Rep.* 76. *Israel vs. Allen*, decided in *Baltimore* County Court.

3. That a *certiorari* does not go to try *the merits* of the *question*, but to see whether the limited jurisdictions have *exceeded* their bounds. 2 *Burr.* 1042.

4. That a *certiorari* will lie after judgment, where the jurisdiction proceeds in a summary manner, and in a course different from the common law. 1 *Salk.* 263. *Com. Dig.* 76. 2 *Burr.* 1042.

5. That a *certiorari* may issue even after judgment executed, where a limited authority has been transcended by inferior jurisdictions, in cases where no writ of error lies, for the purpose of quashing their proceedings.

6. That in this case, *the Levy Court of Baltimore County*, in their power to open and alter roads, is a tribunal of limited jurisdiction, proceeding in a summary method, and in a course unknown to the common law; and that in their confirmation of the return of the commissioners, under the act of 1821, *ch.* 152, in relation to roads, they act judicially and not ministerially.

7. That without the notice required by the act of 1794, *ch.* 52, they have no power to open, amend, alter, change, widen or straighten a road.

8. That until a *number* of inhabitants petition for a road under the act of 1821, *ch.* 152, they have no power to appoint a commissioner, or to pronounce a judgment on any return of commissioners.

9. That a number of inhabitants within the meaning of the law, did not petition the Levy Court in this case, till July, 1823.

10. That the notice required by law, should have corresponded with the time when a legal petition was first preferred to the Levy Court.

11. That the notice being to March term, and no petition within the meaning of the law until July, the notice was not such as is required by law.

12. That this court cannot presume a notice in conformity with law, when the papers and record returned show an illegal and insufficient one.

13. That there being no notice within the meaning of the law conferring power on the Levy Court, the whole proceedings are *coram non judice* and void.

14. That the judgments and orders of the Levy Court of the 7th of October, 1823, and of the 10th of April, 1826, ought to be, and are accordingly quashed.

The defendant by his petition to the Chancellor, prayed that the injunction might be dissolved. The Chancellor directed that the motion for dissolving the injunction stand for hearing on the 13th of May following; provided a copy of his order, &c. be served on the complainants on or before, &c.

The complainants then moved the court to pass an order committing the defendant to the gaol of *Anne Arundel* county, for a contempt by him committed, in not obeying the injunction.

Bland, Chancellor, (23d of April, 1828.) In this case, *David Williamson* having been brought into court on the said attachment, and having made answer on oath to the alleged violation of the injunction; and the solicitors of the parties having been heard; and it appearing, that the acts done in violation of the injunction were done under erroneous advice, and an apprehension that he had, by other judicial proceedings of another court, been authorised to do the same—*Ordered*, that the said *Williamson* do now, forthwith, and with the least possible delay, entirely remove and take away all fences, stones, timber, trees, and all manner of hindrances and obstructions, which he, his agents or servants may have placed or put in or upon the said road, in the proceedings mentioned; and which he, his agent or servants were prohibited from placing or putting in or upon the said road by the said injunction. *Further ordered*, that the said *Williamson* pay all the costs of the proceedings in relation to this process of attachment; and that he stand committed until the said costs are paid.

The defendant, after paying the said costs, appealed from the above order to this court, and entered into bond with security (which was approved) for prosecuting the appeal.

The complainants, on the 5th of May, 1828, by their petition, stated, that since the order of the Chancellor of the 23d of

April, 1828, the defendant had not removed the obstructions from the said road, and had declared and avowed that he would not obey the said order, and that he would not remove, or permit to be removed the said obstructions, &c. Prayer for an attachment against the defendant, to answer for the contempt so by him committed and wilfully persisted in, contrary to this court, and for the continuance of the breach of the said injunction. And also, that by a special order of the sheriff of *Baltimore* county, may be authorized and directed to cause all the said obstructions, &c. to be removed, and the said road to be opened and cleared at the expense of the defendant, &c.

An attachment was ordered and issued accordingly, returnable forthwith; and was, on the 13th of May, 1828, returned by the sheriff, that he had attached the defendant, and had him ready in court to answer, &c. The complainants then moved the court that the defendant be committed to the gaol of *Anne Arundel* county, &c. And at the same time, the complainants, by their suggestion in writing, stated that the defendant, before the filing of his petition, and notice of motion to dissolve the injunction, had committed a breach of the injunction, and at the time of filing his said petition, was actually in custody under attachment for his contempt in committing such breach; and so continued in custody until the order of the 23d of April was passed, which order he has not obeyed; but has wilfully, and in open contempt of this court continued, and still continues his breach of the said injunction. They therefore pray that no motion on behalf of the defendant, to dissolve the said injunction, may be heard, entertained or considered, while he is thus acting in open and wilful contempt of this court, its orders and process. That proceedings in regard to the opening and keeping open the said road as a public highway, are now depending before the commissioners of *Baltimore* county, the lawful and proper tribunal to decide on the shutting up or continuing open the said road in the first instance; subject nevertheless, to have their proceedings in relation thereto, reviewed and reversed, or confirmed by the County Court. Prayer that the motion to dissolve the injunction, may be overruled, &c.

The defendant, on the 14th of May, 1828, in his answer to the petition of the complainants of the 5th of May, 1828, denies the charge in the petition that he will not permit to be removed the said obstructions, &c. so by him caused to be placed in and upon the said road. That the injunction did not require any act to be done by him. He is not conscious of having violated the injunction until December, 1827. He refers to the order of the 2d of December, 1826, showing the ground on which the court originally interfered, and refused then to dissolve the injunction. By that order he was apprized that if "the County Court shall reverse or annul the order of the Levy Court, the restraint upon the defendant must be continued." He admits after the decision of the County Court, he did not expect a dissolution of the injunction. It was the fault of the complainants that it was not made perpetual. The answer then sets out the proceedings of the Commissioners of the County, under the defendants new application, &c. and avers that the order of the Commissioners justified his acts of December, 1827, and would not have been any contempt of this court, even if the injunction had been made perpetual. The only effect of a perpetual injunction, would have been to prevent the defendant from claiming any right to obstruct the road in virtue of the order of the Levy Court, which had been rescinded, and could not deprive him of the right of filing a second petition, &c. He, therefore, in the month of December, 1827, did cause fences to be erected across the said road, as stated in the complainants several petitions of the 4th of January and 9th of April last, and in which petitions the complainants for the first time prayed the court, among other things, to compel the defendant to place the said road in the same situation that it was previous to his closing the same, "*on or about the* 13*th of December last.*" That the acts done on or about the 13th of December last, are the only breaches of the injunction of which the complainants at the time of filing their petition had complained. On the answer of the defendant to the said petition, the Chancellor proceeded to pass his decree upon the whole matter thereof. He refers to the decree of the 23d of April, 1828, and insists that even if the erection of such fences and obstructions as these charged in the several petitions of the 4th of January and 9th of April, could be considered a contempt of the court, he is not now to answer for it, as he has already been before the court to answer the said charges, and the same have been adjudicated. The said petitions prayed that the defendant should be compelled to place the said road in the same situation it was on or about the 13th of December last, and did not require, nay, may be construed to forbid him, to remove any obstructions, &c. of an earlier date—none others had he ever been required to remove. Those which had been placed there before the granting of the injunction, the court upon the *ex parte* application of the complainants, could not command him to remove. The language of the injunction was to *desist*, and did not and could not command him to *do*. That the first order of this court, whether in the form of an injunction or of a decree in the premises, commanding the defendant to remove or take away any fence, stones, &c. is to be found in the decree of the 23d of April, 1828. This decree the defendant admits has not been executed by him. He has prayed an appeal from it; has given bond with approved security, and insists that the same operates a stay of all further proceedings until the same is affirmed, or the defendant fails to prosecute it. That the execution of the decree at this time would deprive him of every benefit, that by a reversal of it, should it be reversed, he would gain, &c. Prayer to be dismissed.

Bland, Chancellor, (20th of May, 1828.) The defendant having been brought before the court in custody, by an attachment upon a charge of contempt, in having committed a breach of the injunction heretofore granted in this case; and the motion for a dissolution of the injunction standing ready for hearing, the solicitors of the parties were heard in relation to both of those matters, and the proceedings read and considered.

A brief review of this case seems to be necessary to a correct understanding of the matters now to be decided upon. [The Chancellor's opinion then stated the facts, proceedings, and views of the case, as before set out, and said,] it was to this state of the pleadings and to arguments of this nature, I addressed myself in the order of the 2d of December, 1826, by which the injunction was continued until the hearing on further order. The defendant, it will be seen by his answer and his motion thereon for a dissolution, did not, as it would seem, then consider an order of the Levy Court for shutting up the road, (even admitting it to have been in all respects a final, conclusive and irreversible judgment,) as having of itself the effect of annulling the injunction, or as virtually dissolving it, without any motion or application to this court for that purpose. No such notion had been in any manner intimated or suggested, either in the pleadings or arguments as they were then presented to this court; and it never once occured to me, at the time of uniting that order, that any such notion ever had been, or would be advanced or attempted to be sustained. Indeed so far from it, the contrary is clearly deducible from the course pursued by the defendant himself. For, although he did contend, that the order of the Levy Court for closing the road was conclusive; yet, he deemed it necessary, and then came here to ask a dissolution of the injunction as soon as practicable; because, until it was dissolved *by this court*, he could not take the benefit of that legal authority which he had thus obtained from a competent tribunal; and as he distinctly alleged, the continuance of it would be attended with great and irreparable damage and loss to him. Thus expressly admitting, that so long as the injunction remained in full force, and unrevoked *by this court itself*, he would not be justified in disobeying it by any authority which he could obtain from any other tribunal.

The granting of the injunction was predicated upon the fact, that the specified lands of the defendant were charged with a public servitude as a highway; the defendant bottomed his prayer to be relieved from the restraint, upon the allegation, that it had been finally discharged from that servitude; he failed to sustain his allegation; and the injunction was continued.

The principle, that an injunction once granted, continues in full force until dissolved by the court by which it has been awarded, is so entirely obvious, and so necessary to preserve harmony among the several branches of the government; and to prevent any one tribunal from being brought into collision with the legislature, or any other court of justice which may have the power to exercise authority upon the subject to which the injunction relates, that I had supposed it never had been, or would be questioned by any one. And my order of the 2d of December, 1826, was written under this strong impression. The parties, by the proceedings as they then stood, looked to the final determination upon the proceedings of the Levy Court by the County Court, as that decision by which the right to the highway in question, was to be put at rest; and, therefore, I said, that they must be held in their then situation, to await that decision. But I neither intimated nor supposed, that the parties were, or could be restrained from pursuing any legal course whatever, for the purpose of having the right to this public road finally determined. I was aware, that if it should be in any way legally closed, either by the legislative or judicial authority, this defendant would be entitled to be relieved from the restraint which had been imposed upon him. But, I did not for a moment suppose, that this defendant, after the obligation he had admitted himself to be under to obey the injunction, notwithstanding the legal authority he had, as he said, obtained, would at any time afterwards, attempt to disobey it, because of any other legal authority which he might believe he had obtained in any other manner than that to which he then especially referred. And, it is clear from what I then said, that I expected to hear again from the defendant as soon as he had, in any manner whatever, succeeded in obtaining a final and complete legal authority for closing the road, which the injunction had thus restrained him from obstructing. In short, the whole course of proceedings, antecedently to this period, so far from warranting the inference that the injunction could be virtually dissolved by any other judicial proceedings, shows, that it was, notwithstanding any such proceedings, to be considered as in full force until dissolved by this court itself.

On the 3d of January last, the defendant filed a petition, in which he states, that the proceedings of the Levy Court referred to in the bill, had been taken by *certiorari* to the County Court, and by that court set aside; that he had made another application, and had obtained an order for closing this road; which order, he says, being final and conclusive without appeal, and he being greatly aggrieved by the passing of the old road over his lands, and conceiving himself fully authorised so to do, by that order, did in virtue thereof, proceed to close it from A to B, as designated on the plot, [returned under the last order for closing the road,] and that he shut it up, without force, and without opposition from any one. And then concludes by asking leave to file an amended answer, setting forth the several matters therein stated, and that the bill be dismissed upon such terms as may seem just. This petition not being sworn to, and, even if it had been sustained by an affidavit, laying no proper ground for leave to amend the answer, was, by an order passed on the next day, dismissed with costs.

On the same 3d of January last, the plaintiffs also filed a petition with sundry affidavits, showing that the road had been obstructed and closed by the defendant, in disobedience of the injunction, and praying for an attachment, which was ordered, issued, served, and returned executed. But the plaintiffs, as it seems, suffered it to pass off without asking to have any thing done upon it. On the 9th of April last, the plaintiffs again asked an attachment against the defendant for disobeying the injunction, which was awarded; and on the 22d of April last, he was brought before the court, in custody, when he filed his petition on oath, with a reference to the bill of injunction, answer, order and attachment for contempt. In this petition he sets forth, that the proceedings of the Levy Court, which were removed by *certiorari* to the *Baltimore* County Court, having been there considered and quashed, he had afterwards made a new application to the Levy Court, and had obtained an order to shut up the road in question; which order was final and conclusive, without appeal—no writ of *certiorari* having been applied for. That conceiving himself fully authorised to close the old road, so far as it passed over his land, and not in contempt of this court, he did shut it up accordingly. Whereupon, he prays that the road may be suffered to remain closed, that he may be released from custody; and that the attachment may be quashed.

It appears then, by the defendant's petitions of the 3d of January and 22d of April, that he had conceived himself fully and legally authorised to close this highway by virtue of the order of the Levy Court, notwithstanding the injunction of this court, which had positively prohibited him from closing or obstructing it in any way whatever; or, in other words, that the final order he had obtained, had virtually, yet effectually and completely dissolved and annulled the injunction heretofore granted by this court. The defendant made no application or motion to have the injunction dissolved after the 2d of December, 1826, until the 22d of April last. He has not even deigned to speak of the injunction, in the body of either of those petitions, in which he acknowledges and attempts to justify the closing of the road; and yet, in the first, he asks to be permitted to file an amended answer, and to have the bill dismissed; and in the second, he prays that the road may remain closed; and that he may be discharged from the attachment. If the prayer of his first petition had been literally and fully granted, and the bill dismissed; yet, that would not have dissolved the injunction, unless it had been so expressly ordered. By the second petition, this court is, in effect, gravely asked to make a most extraordinary transit over all its own proceedings, into those of the Levy Court; to approve, and act upon them, and totally disregard its own. For, an order of this court, as prayed, that the road should be suffered to remain closed, and that the defendant should be discharged from the attachment, most manifestly, could stand upon no other foundation than a complete affirmance of the proceedings of the Levy Court, and an entire disregard of all the previous proceedings of this court. I never before heard of such an indirect mode of obtaining a virtual dissolution of an injunction, by bringing to bear upon it a judicial decision of another, and totally different tribunal, not exercising, or having any appellate jurisdiction over the court, whence the injunction issued. An injunction, emanating from a competent authority, is a command of the law; and the citizen is, as I have always understood, bound to yield implicit obedience, until the restriction has been removed by the authority which imposed it. But, if the position assumed by this defendant be correct, then, instead of obeying, or moving to dissolve an injunction, a party may avail himself of various modes of getting around, or under, or over it, without being chargeable with the slightest contempt of the law. The judgment of this court, continuing the injunction, was founded upon the proof or admission of certain facts, after hearing both parties, as to the very point, whether it ought to be continued or not. But, if it could be indirectly and virtually dissolved by a judgment of the Levy Court, upon a different case, then it might be evaded by one party, without hearing the opposite party as to the former, or any new facts, or equity which he might be able to show, as a most solid ground for its further continuance. The court, commanding obedience to an injunction, might thus be brought into collision with another court, alleged to have sanctioned, or, as this defendant has said, *ratified* the acts in disobedience of it; in which conflict of jurisdiction, the rights of persons and of property, it is evident must suffer; while he who produced the scuffle, might escape with the spoil. Surely, such principles, which, to say the least of them, lead so directly to disorder and confusion, ought not to be tolerated for a moment. It was upon these considerations, that I passed the order of the 23d of April last, from which the defendant has appealed, and given bond for the prosecution of his appeal. After I had in open court, addressing myself to the argument that had been urged in support of the defendant's petition of the 22d of April last, declared, that the order of the Levy Court could not be allowed to operate as a virtual dissolution of the injunction; that it could only be dissolved by this court itself, on motion, after hearing the parties; and that until so dissolved it must be considered as in full force, and would be enforced by attachment; the defendant, on the same 22d of April, filed his petition praying for a dissolution of it, upon which the court, on that day, passed the order appointing the 13th inst. for the hearing of the motion to dissolve, on notice being given as directed. On the

5th of the present month, the plaintiffs filed their petition, with an affidavit, in which it is stated, that the defendant had violated the injunction by causing obstructions to be erected across the road, which he had not removed as he ought to have done, in obedience to the order of the 23d of April last; whereupon they prayed that an attachment might be issued against the defendant, "to answer for the contempt so by him committed and wilfully persisted in, contrary to the order of this court; and for the continuance of the breach of the said injunction." And they further prayed, that the sheriff of *Baltimore* County might, by a special order, be directed to remove the obstructions complained of. The attachment was ordered as prayed; upon which the defendant was brought before the court in custody, on the 13th instant, the day appointed for hearing the motion to dissolve the injunction; and he then moved to quash the attachment; because an appeal had been prayed and bond given which had suspended the further proceedings of this court. On the next day, the 14th instant, the defendant filed an answer on oath to the alleged contempt; in which he claims a discharge upon two grounds—*First*, that the injunction only operated as a restraint from closing the road, under and by virtue of the authority of the Levy Court, referred to in the bill; but did not prohibit him from shutting it up under any other authority than the one mentioned; and *secondly*, that the whole subject matter having been heretofore brought before the court, and having been embraced and adjudicated upon by the order of the 23d of April last, has been suspended by the appeal from that order; and cannot, therefore, be now in any manner treated as a contempt of this court.

The bill upon which the injunction was granted, as is usual in such bills, recites the colourable or pretended legal authority under which the defendant had obstructed the specified highway, contrary to law; and avers, that the pretended legal authority of the Levy Court, under which the defendant had assumed the right to act, was erroneous, and that its validity was a question depending, and then to be decided upon by a superior tribunal; and hence, the defendant having then no authority whatever to close the road, it thereupon prays, in general terms, that he may be altogether enjoined from doing so. There is absolutely nothing in the prayer of the bill, nor in the writ of injunction itself, which limits the prohibition to a shutting up under the order of the Levy Court, or under any other particular and specified authority whatever. Neither the terms of the prayer, nor of the writ make any allusion whatever to any judicial proceedings of any kind then depending, or thereafter to be instituted. The restriction imposed upon the defendant is as general and comprehensive as it could well be expressed. The clear and unequivocal sense of which is, that the road shall continue to be considered as a public road or highway, which the defendant shall not be permitted to close until he shall produce and show to this court, that he had obtained a legal authority to do so. Therefore, the only question now is, whether the acts done by this defendant are such as he was prohibited from doing by the injunction? Those acts are the erection of obstructions upon this highway; now those are the very acts which this injunction does most positively and distinctly prohibit. It is true, that if the injunction had prohibited acts of one description from being done, and the party restrained had done acts of another description, he could not, as the defendant has alleged, be charged with a contempt. The injunction did not prohibit him or any other person from instituting any proceedings, or making any application for the purpose of obtaining a legal authority to close this road; and consequently such acts of the defendant cannot be regarded as a breach of the injunction. So, too, if any other person had obtained an authority to close this road, such person might have proceeded, at once, to shut it up; but, most unquestionably, this defendant cannot be allowed to do so, upon his obtaining an authority to close it, until he has first shown that authority to this court; and upon motion and notice to the opposite party, according to the established practice, obtained a dissolution of that general and unqualified restraint which has been imposed upon him by the injunction. This first cause shown by the defendant, for his discharge, being based upon an assumed position not warranted by the proceedings, is therefore deemed insufficient. Indeed, the showing itself seems tacitly to admit the correctness of the charge of contempt, but for that qualification of the injunction which it has assumed, and which has in fact, no real existence.

The *second* ground upon which the defendant rests his claim to be discharged, is, that this whole subject has been taken from this court to the Court of Appeals. I feel no disposition to meddle in any way whatever, with appeals from this court; and certainly shall not, knowingly or intentionally, check, control, or retard them in any manner or form, either directly or indirectly. And, therefore, until otherwise directed by the Court of Appeals, I admit, that the appeal has entirely suspended the power of this court to execute the order of the 23d of April last; and consequently, that the defendant cannot now be charged here with any contempt for a disobedience of that order. With regard to the prayer of the plaintiffs' petition of the 5th of May, instant, that the sheriff may be ordered to remove the obstructions that have been placed in this road, I deem it unnecessary, upon this occasion, to express any opinion whatever. But the injunction has not yet been dissolved, and there has been no appeal or other proceeding by which the enforcing of that command has been waived or suspended. The petition of the plaintiffs of the 5th instant, and the attachment awarded thereon, charges the defendant with contempt by acts "committed and wilfully persisted in contrary to the order." And also by "the continuance of the breach of said injunction;" or, in other words, "in disobeying the injunction and order heretofore issued in this cause." The language of the writ of attachment is, as usual, general; but so far as it is calculated to embrace a charge of disobeying the order appealed from, it is considered as improper. The defendant, as to so much, must be discharged, and that writ, so far, is hereby quashed.

The question, therefore, is reduced to this, whether or not the appeal from the order of the 23d of April last, has suspended the authority of this court to enforce obedience to the injunction? The order of the 23d of April, is an adjudication upon the subject matter then submitted to the court for its decision, and nothing more. The defendant had been brought before the court upon a charge of contempt, for having violated its injunction; and upon that charge it pronounced that judgment. The court had the power to have committed the defendant to prison, and to have imposed a fine upon him; but, considering the erroneous advice and misapprehension under which he had acted, it imposed the lightest punishment it could select in application to the circumstances and nature of the case—which was, that the defendant should immediately himself be at the expense and trouble of removing the obstructions, and should pay the costs of the attachment. But suppose this order had been literally obeyed, and the defendant had afterwards erected other obstructions on this road, during the continuance of the injunction, the court, on application, would certainly have had him brought before it, and punished for this new contempt; or if the defendant had neither obeyed, nor appealed from the order, then, on application, he might have been attached and punished, as well for his failure to *remove* the obstructions *as ordered*, as for the *continuance* of them in disobedience of the *injunction*. Every continuance of a nuisance, or trespass, is a new and additional subject of complaint, and each continuance may at law be made the subject of a separate prosecution or suit. The not removing the obstructions, and the continuance of them are clearly two distinct subjects. The first is embraced by the order which has been suspended by the appeal. But the second can only be considered as a violation of the injunction, which has been in no way dissolved or suspended; because, it was that alone, and not the order, which prohibited the continuance of the obstruction. Every continuance of the obstructions is a new and distinct ground for an attachment. All contempt for the continuance of these obstructions, antecedent to the order of the 23d of April, and also during such reasonable time thereafter, within which the defendant might have complied with it, are embraced under, and to be atoned for by him, upon the terms of that order. But the specified continuances of them since, are totally distinct subjects of complaint; are new violations of that injunction, which is admitted to be in full force; and are now to be treated and considered as if nothing had occurred in disobedience of it, prior to that time. I am, therefore, of opinion, that this second cause upon which the defendant rests his claim to be discharged, so far as relates to the continuance of the obstructions, after they might have been removed as above mentioned, is as entirely unfounded as the first.

The plaintiffs have, by their petition, suggested, and also urged in argument, that the defendant, while in contempt, is not in a situation to move for a dissolution of the injunction; that his petition, asking to have a day appointed to hear a motion for a dissolution, having been filed before he had cleared himself of the contempt wherewith he then stood charged, was irregular, and that the motion cannot now be heard, until he has cleared himself of the present charges.

It is certainly true, as a general rule, that a party will not be permitted to come in and claim the benefit of that judicial authority, which he has contemned and set at naught. He must recognize its power by obedience, and clear away all imputations of contempt, before he can be allowed to ask from it any relief. But the circumstances of this case are evidently very peculiar. The nature and extent of the punishment to be imposed upon the defendant, for the breach of the injunction, with which he now stands charged, ought, and must depend, in some degree, upon the determination, whether the injunction is to be continued or not. If it is dissolved, a mere corrective fine, proportioned to the disobedience complained of, will be sufficient. If it is continued, then he should, at the least, as before, be ordered to remove the obstructions; to pay all the costs; and also to pay a fine, or stand committed, or both; which may be hereafter so increased as to insure obedience. It therefore occurred to me, to suggest to the solicitors, the propriety of now hearing the motion to dissolve the injunction, in order that I might, upon the attachment, adopt the most suitable mode of enforcing obedience to the injunction, should I come to the conclusion that it is to be continued. The motion for a dissolution, was accordingly taken up and argued; and I shall now proceed to consider and decide upon it.

On adverting to the proceedings which have been in this case, antecedent to the 13th instant, it will be seen, that the defendant admits he closed the road subsequently to the service of the injunction upon him; and that he also admits he has not hitherto obtained from this court a dissolution of that injunction. These positions are unquestioned and unquestionable. From these premises, I conceive it to be the duty of this court, to assume and act upon the position, that this road is now open, and has not been as yet closed, so far as regards this defendant. For if the defendant were admitted, in any way, to avail himself of that shutting of it up, which has been in fact done by himself, then he would be thus suffered to take advantage of his own wrong, which can never be allowed. And from a review of this case, I also consider it proper, as regards the defendant, to assume and act upon the position, that he cannot claim a dissolution of this injunction, unless, at the time of asking it, he shows, that the closing of the road, so far as it passes over his land, has been legally and finally authorized by some competent authority; and that the question, whether it should be closed or not, is not, at the time of hearing the motion for a dissolution, depending before any legal and competent tribunal.

The plaintiffs, by their petition filed the 13th instant, set forth and show several causes why the injunction should not now be dissolved as prayed; and, among others, they show, that proceedings have been instituted, and are now depending before the Commissioners of *Baltimore* county, a legal and competent authority, for having this same highway, called the *Garrison Forest Road*, opened, and kept open, as it has heretofore been. As I have observed upon a former occasion, in regard to the Levy Court, whether the proceedings which have been thus instituted before the commissioners, are as correct and regular as they ought to be, is not for this court to determine. It is enough, that it satisfactorily appears, now, upon the hearing of this motion, that the defendant has not yet obtained a final and conclusive legal authority to close this road; and, that he has, as yet, no right to shut it up; because the right to do so, is, at this time, depending before, and to be determined by a legal and competent tribunal. And, therefore, until that proceeding has been finally terminated; or rather, until the defendant can show to this court, some good and sufficient legal authority for closing it, this injunction, by which it has been in point of law, up to this time, kept open, so far as it passes over his land, must be continued.

Ordered, that the injunction heretofore granted in this case, be, and the same is hereby continued until final hearing in, or further order of, this court.

Ordered also, that the defendant do forthwith, and with the least possible delay, entirely remove and take away all fences, &c. and all manner of obstructions, which, having been heretofore by him, his agents, or servants, placed or put in or upon the road in the proceedings mentioned, contrary to the inhibition of the said injunction, he has suffered to remain and continue in and upon the said road in disobedience of the said injunction, after he might have removed the same as directed by the order of this court of the 23d of April last.

Ordered also, that the defendant for his contempt in not obeying the injunction of this court, by continuing the said obstructions in the said road as aforesaid, after the time when he might have removed the same as directed by the order of this court of the 23d of April last, pay a fine of fifty dollars, and all the costs of the last mentioned attachment, and that he stand committed until the said fine and costs are paid.

From which last mentioned order, and also from the order of the County Court directing the injunction to issue in this cause, (12th of May, 1826,) and from the order of the Chancellor of the 4th of January, 1828, directing an attachment to be issued against the defendant, and also from the order of the court of the 9th of April, 1828, directing another attachment to issue against the defendant, he also appealed to this court. And, upon the defendants presenting to the Chancellor the bond which he had entered into with sureties for prosecuting the said appeal, the Chancellor on the 21st of May, 1828, passed the following order—

Ordered, that the foregoing bond this day filed, be, and the same is hereby approved. And, in reply to the motion submitted, the Chancellor declares it to be his opinion, that the said bond having been filed and approved before the actual payment of the fine and costs, as commanded by the order passed yesterday, which has been appealed from, and before the defendant had been actually committed to the custody of the messenger, to be by him closely confined in gaol, operates as a *supersedeas* of all further proceedings for that or any other purpose, in relation to the matters appealed from.

The said appeals being allowed, a transcript of the record was transmitted to this court.

At June term, 1828, on a motion made by the appellees to dismiss these appeals, it came on and was argued before **Buchanan**, Ch. J. and **Earle**, **Martin** and **Archer**, J.

Gwynn, for the appellees, in support of the motion, referred to *Snowden vs. Dorsey*, 6. *Harr. & Johns.* 115, and *Thompson vs. McKim*, *Ibid.* 302. He insisted that the appeal from the order of the 12th of May, 1826, was too late, and cited *Strike vs. McDonald*, 2 *Harr. & Gill*, 191. He also insisted that the order of the 20th of May, 1828, refusing to dissolve the injunction, was a mere interlocutory order, whereby no rights were finally settled between the parties, and from which no appeal would lie.

Magruder, against the motion, referred to 1 *Madd. Ch.* 128. *Eden on Inj.* 162, 163, 167. Co. Litt. 56. *a*, and the act of Ass. of 1794, *ch.* 52 *sec.* 14. He urged that there could be no breach of the injunction, until the decision of *Baltimore* County Court, under the *certiorari*. If the appellees had applied for and obtained a perpetual injunction, then the appellant might apply to the Levy Court, and obtain another order to close the road. *Denton vs. Jackson*, 2 *Johns. Ch. Rep.* 321. On an injunction to stay waste, pending an action of ejectment or trespass, it will be dissolved, on motion, unless it is shown that the complainant had succeeded at law. Here, on the decision made by *Balti-*

more County Court, the injunction was at an end—it had performed its office. The proceedings of the Levy Court being annulled, the appellant had no right to shut up the road; but he applied again to that court, and another order for shutting the road up was granted to him;—and he then did shut up the road. After which, it appears that the appellees applied to the Commissioners of the county, (they being substituted in the place of the Levy Court,) to *open* a new road where the old road had run. He contended that the orders of the Chancellor, directing the appellant to remove obstructions, &c. from the road in question, affected his rights; and that his rights were as much affected thereby, as in *Thompson vs. McKim.* If he were to remove his fences, &c. from the road, and it should be finally decided that they ought not to have been removed, how could he then be compensated for the injury he had sustained.

Taney, (Attorney General,) also, against the motion in his argument, referred to *Attorney General vs. Utica Insurance Company*, 2 *Johns. Ch. Rep.* 378. *Eden on Inj.* 157, 162, 163.

Gwynn, in reply, cited *Eden on Inj.* 55, 56, 162, 163. He said that the court could not compel the party to resort to a new injunction, where the reasons for a former injunction had ceased to exist, and new reasons had arisen which would justify an injunction.

Buchanan, Ch. J. delivered the opinion of the court. The order of the *Commissioners of Baltimore County*, on the 13th of December, 1827, confirming the report of the commissioners appointed by the *Levy Court* of that county, and directing and authorising the old road to be shut up, placed the premises over which it formerly run, under the controul of the appellant to whom the land belonged, and gave him the same right of user of the land of that road, that he had of the rest of his estate. And we think that the subsequent order of the Court of Chancery, does so materially affect the right and interests of the appellant as to bring the case within the principle of *Thompson* *vs. McKim*, heretofore decided by this court, and form a fit subject of appeal.

The motion, therefore, to dismiss these appeals, is overruled.

MOTION OVERRULED.

Earle, J. dissented.

Tiernan *vs.* Poor, *et ux. et al.—December*, 1829.

Where the facts charged in a bill were all admitted to be true by the pleadings, and there was no replication, but the parties agreed that the Chancellor might take the papers and decide the cause; by such agreement the cause is set down for hearing, and whether the proceedings of the defendant be regarded as a plea, or as an answer, the question submitted, is on their legal sufficiency to bar the plaintiff's claim.

When any instrument of writing is designed to operate as a transfer of property, and proper and apt terms are used, whereby the meaning of the parties can be clearly ascertained, if some circumstances are omitted to give it legal validity, which deprive it of its intended, specific operation, a Court of Equity will set it up as a contract, or as evidence of a contract; and when the rights of innocent third parties would not thereby be affected, will, as between the parties to such instrument, carry it into specific execution; *provided* it be founded upon a valuable consideration.

P and his wife, in consideration that T would give up a lien which he held upon P's personal property, agreed to execute a mortgage of certain real property, which, by a post-nuptial settlement, had been conveyed to trustees for the sole use of the wife, with power to her to "sell, convey and dispose of the same, absolutely in such manner as she might think proper to direct, without the concurrence of her husband, and from and after her decease, such parts of the property as should be left undisposed of, by her deed or contract," was conveyed in trust to her children. In pursuance of such agreement, T gave up his lien, and P and his wife executed a deed to T, for some of the trust property. The deed was in the usual form of a mortgage, except that the wife was not examined apart from her husband, by the justice of the peace who took her acknowledgment, and according to the Acts of Assembly passed in relation to deeds executed by *femes covert* grantors. Upon a bill filed by T, praying a sale of the mortgaged premises, the court held, that whether the instrument of writing which forms the basis of this call, for the interposition of a Court of Equity, be in fact a mortgage, in its legal and technical sense, in consequence of its not having been acknowledged in the manner which the acts of Assembly require, it was not necessary to determine; but it was clearly intended to be a mortgage, and within the limits of the wife's disposing power; and therefore decreed the property mentioned therein to be sold.

The title to the assistance of a court must be exposed by the pleadings; but the style and character of pleading in equity, has always been of a more liberal cast, than that of other courts; as mispleading in matter of form there, has never been held to prejudice a party, provided the case made is right in substance, and supported by proper evidence.

Appeal from a decree of the Court of Chancery, dismissing a bill of the complainant, (now appellant.) The original bill, filed on the 21st of February, 1822, stated that *Dudley Poor*, (one of the defendants,) being indebted to the complainant in the sum of $600, and desirous of securing the payment thereof, and the interest, in consideration thereof the said *Poor*, and *Deborah* his wife, (another of the defendants,) on the 28th of March, 1820, executed to the complainant a deed of mortgage, by which they conveyed to the complainant a lot of ground in the city of *Baltimore*, on the north side of *Market street*, next to the corner of *Gay street*, No. 50, with a proviso, that upon payment of the said sum of money, and interest, on or before the 1st of July, next ensuing the date of the said deed of mortgage, the same should be void; which said deed of mortgage was averred to have been duly acknowledged and recorded on the 27th of September, 1820. That although the said 1st day of July next ensuing the date of the said deed of mortgage, and the period therein mentioned for the payment of the said $600, with the interest due thereon, has long since passed by; yet the said *D. Poor*, and *Deborah*, his wife, have neglected to pay the said sum of money, &c. *Prayer* for a sale of the mortgaged premises, &c. and for further relief.

The deed of mortgage exhibited by the complainant, as stated in his bill, was dated the 28th of March, 1820, executed by *D. Poor*, and *Deborah*, his wife, to the complainant, whereby, in consideration of the sum of $600, to them paid, they conveyed the lot of ground mentioned in the bill, with the proviso therein stated, with a covenant for further and other acts, deeds, assurances and conveyances. The deed of mortgage was signed and sealed by the said *Poor* and wife, and acknowledged by them before two justices of the peace, &c. on the day of its date. But there did not appear to have been any private and separate examination of the wife, apart from her husband, as required by the acts of Assembly, to conveyances, executed by *femes covert*, conveying their real estates, or relinquishing their rights of dower. The deed was recorded on the 27th of September, 1820.

The *answer* of *Poor* and wife, admitted the execution of the deed of mortgage; but by *way of plea and answer* to the bill, they stated that the defendant, *Deborah*, is one of the heirs at law, representatives and devisees of *John O'Donnell*, deceased, and as such, was entitled to a large real and personal estate, as her distributive share of the said estate. That the said estate was distributed and divided among the legal representatives of the said *O'Donnell*. They further stated, that after the said estate was so divided and allotted, they, the defendants, by a deed duly executed, acknowledged and recorded, bearing date on the 24th of August, 1816, did convey, &c. unto *Columbus O'Donnell* and *John H. Poor*, all their estate, and interest in the said share of the estate of the said *John O'Donnell*, in trust for the sole and separate use, benefit and behoof of the said *Deborah*, for and during the term of her natural life, so that she be suffered and permitted, peaceably and quietly, to use, &c. the said real estate, property and premises thereby conveyed, and the rents, &c. thereof, and of every part thereof to receive, take and apply to her separate use, without being subject to the disposition, &c. of the said *Dudley Poor*, or of any future husband of the said *Deborah*, and in no wise liable or answerable for the payment or fulfilment of his or their debts, contracts or engagements; and so as that the same estate and property thereby granted and conveyed, and every, or any part or parcel thereof might be sold, conveyed and disposed of absolutely, by the said *Deborah*, in such manner as she may think proper or direct; and that without the concurrence of her present, or any future husband. And from and after the decease of the said *Deborah*, then as to the whole of the same estate, property and premises thereby granted and conveyed, or such parts or part thereof, as may remain undisposed of, by deed or contract, in trust for all the children of the said *Deborah*, and their heirs, as tenants in common, equally. But in case the said *Deborah* shall depart this life, without leaving a child, or a descendant of a child, living at the time of her death, then, in trust for the use, and behoof of such person or persons, or for such uses and purposes as the said *Deborah*, (her coverture notwithstanding, or whether sole or covert,) shall or may, by any instrument of writing in the nature of, or purporting to be her last will and testament, direct, limit and appoint; and in default of such limitation or appointment, then for the use, benefit and behoof of the right heirs of the said *Deborah*, and their assigns, forever. And upon this trust, nevertheless, and with full power to the said *Columbus O'Donnell* and *John H. Poor*, and the survivor of them and his heirs, with the consent, and by the direction of the said *Deborah*, testified in due form, but not otherwise, from time to time, at any time thereafter, to make any lease or leases, demises or grants of the estate and property thereby conveyed, or of any part thereof, with the appurtenances, for any term or terms whatever, renewable or not renewable, so as upon every such lease or leases, there be reserved to continue payable to the said *Columbus O'Donnell* and *J. H. Poor*, and the survivor of them, and his heirs, during the respective lease or leases, the best rents that can be obtained for the same; and so as in every such lease or leases, there be contained reasonable and usual covenants, in like cases; and also a proviso or clause of re-entry for non payment of the rent or rents thereby reserved. And these defendants further say, that the real estate specified and mentioned in the said mortgage was included in the said deed to the said *C. O'Donnell* and *J. H. Poor*, and was a part thereof. And these defendants, *by way of plea*, and in bar of the complainants right to recover in the said bill, say that they are advised they had no legal right to make the ssid deed of mortgage, and that no legal interest or title whatever was thereby conveyed to the complainant—the legal title being outstanding in the said trustees, *C. O'Donnell* and *J. H. Poor*—and moreover, that the said deed of mortgage is defectively executed; and even if a legal or equitable title existed, in these defendants, that the said deed is wholly defective in its execution, and agreeably to the laws of this state conveyed no title, legal or equitable, to the complainant. And these defendants, therefore, pray hence to be dismissed, with their costs, &c.

The deed of trust exhibited by the defendants, was dated the 24th of August, 1816, executed by them to *C. O'Donnell* and *J. H. Poor*, conveying the real estate, &c. as mentioned in the above answer and plea, and in the manner, and upon the trusts as therein stated. It was acknowledged by the defendants on the day of its date, and the wife was privately examined apart from and out of the hearing of her husband, &c. and was recorded on the 21st of September, 1816.

The complainant having obtained leave for that purpose, amended his bill by making *C. O'Donnell* and *J. H. Poor* parties defendants.

The *answer of D. Poor* and *Deborah* his wife, to the amended bill, admitted *C. O'Donnell* and *J. H. Poor* mentioned therein, as trustees of the said *Deborah* in the deed of trust, are the trustees appointed by the same as therein alleged.

The complainant having again obtained leave for that purpose, further amended his bill, by stating that after the execution of the deed of trust, and before the execution of the mortgage, *D. Poor* had rented from the complainant a dwelling house in the city of *Baltimore*, which house *D. Poor* and his family had occupied for a considerable period. That shortly before the execution of the mortgage, there was due to the complainant from *D. Poor*, the sum of $600, as rent in arrear for the said house, and for which the complainant had levied a distress on the goods and chattels of the said *D. Poor*, then in the said dwelling house, of sufficient value to secure the said rent; and, at the time of the agreement hereinafter mentioned, had and held the said distress in full force and effect. That on the 28th of March, 1820, the complainant being possessed of the said security for his rent aforesaid, the said *D. Poor* and *Deborah* his wife, agreed with him, that they would execute the mortgage filed with the original bill in this cause, for the purpose of securing the payment of the aforesaid rent, in consideration that the complainant would relinquish his said distress, and give up the said goods and chattels, levied on as aforesaid. The complainant alleges that he complied with the said agreement on his part, and the said *D. Poor* and *Deborah* his wife, in pursuance of the said agreement, executed the said mortgage, and the said goods were given up to the said *D. Poor*, and the said mortgage was duly recorded according to law. That the said mortgaged property constituted a part of the property mentioned in the said deed of trust; and that the complainants claim remains unpaid. *Prayer*, that the mortgaged premises may be decreed to be sold, &c. and for other relief, &c.

To this amended bill, all the defendants answered, admitting the facts set forth in the said bill of complaint, to be true as stated; yet they allege and contend that the complainant is not entitled to relief; and therefore pray that the said bill may be dismissed with costs, &c.

Agreement. "It is agreed in this case that the Chancellor may take the papers and give a final decree—the counsel for both parties considering that the questions of law connected with it, having been fully discussed before his honor, the Chancellor, in a late case against the same defendants, that it is unnecessary to discuss them again." Signed by the counsel.

BLAND, Chancellor, (September term, 1826.) From the whole proceedings the case appears to be substantially no more than this. The plaintiff, to secure a debt due to him, obtained a mortgage of certain property from *Dudley Poor* and wife, who by their plea allege, that prior thereto the mortgaged property had been conveyed to *Columbus O'Donnell* and *John H. Poor*, in trust for certain uses as in that deed mentioned, and therefore, that *Dudley Poor* and wife had no right or power in equity to make and execute the mortgage relied on in the bill. The plaintiff has admitted the sufficiency of the plea by replying to it. And the truth of the facts therein stated, which alone has been put in issue, is clearly established by the proceedings in the cause. The plea covers the whole substance and merits of the plaintiffs case, and consequently, being fully sustained in law and fact, puts an end to it altogether.—**Decreed**, that the bill of complaint of the complainant be dismissed with costs.

From which decree the complainant appealed to this court, where the following agreement was entered into by the counsel of the parties.—"In this case it is agreed that the plea to the original bill shall be considered as a plea to the amended bills—the appellant reserving all objection to the plea itself, both in form and substance, and not admitting it to be a plea at all."

The cause was argued before **Earle**, **Archer** and **Dorsey**, J.

Gill for the appellant contended,—1. That the deed of trust from *D. Poor* and wife to *O'Donnell* and *J. H. Poor*, conveyed to Mrs. *Poor* an equitable estate for her sole use, independent of her husband; which estate she had a right to assign absolutely or mortgage at her discretion, by the terms of the trust deed.

2. That having such right, it is bound by her contract set forth in the bill; and the Chancellor erred in not decreeing a sale of it to satisfy her contract.

3. That if there be any error in the mortgage from *Poor* and wife to the complainant, then upon the original contract independently and without that mortgage, the complainant having fulfilled his part of the contract, and *Poor* and wife having received a valuable consideration from him, he is entitled to a sale of the property described in the mortgage, to satisfy his claim.

4. That this cause is substantially before this court, as it was before the Chancellor, upon general demurrer—the answer to the amended bill being in effect a demurrer.

5. That there was no plea filed by the defendants in this cause.

6. That if there was a plea, it was abandoned or overruled by the last amended answer; and if not, the agreement to submit the case, was in effect, setting the plea down for hearing.

On the *first* and *second* points, he cited *Price & Nisbet vs. Bigham's Ex'rs*, 7 *Harr. & Johns.* 296, 318.

On the *third* point, he cited *Williams's Ex'rs. vs. The Mayor &c. of Annapolis*, 6 *Harr. & Johns.* 533. *Hunt vs. Rousmaniere's Adm'rs*, 1 *Peters's S. C. Rep.* 13.

On the *fourth* point. This case is to be considered as if the defendants had demurred. The bill as last amended is admitted in every particular. It is not in any respect contradicted by the plea filed to the original bill, and the last amended answer in terms, admits the amended bill; and it is this bill which discloses the plaintiffs claim. There is no dispute about, no denial of the facts. There was nothing for a replication to act upon. Nothing then was left for the Chancellor to decide, but the law of the case arising upon the bill. In effect, therefore, it is as if a general demurrer had been filed, and exclusively relied upon. The law of this case in every particular is settled by this court in the case in 7 *Harr. & Johns.* before referred to. The law of this case is its conscience and honesty, arising from the fact, that the plaintiff at the request of the defendants, *Poor & Wife*, gave up to them a valuable property, for which he now asks payment.

On the *fifth* point. Is there any plea in the case? The Chancellor says there was a plea to which the complainant replied. If there was a plea to the original bill, it is admitted there is one to the amended bills. But it is denied that it was a plea at all. It is an answer, and not a plea. It is wholly deficient in the form and substance of a plea. *Mitf. Plead.* (*ed.* 1812,) 235, 238, 240. *Beames's Eq. Plead.* 339, 340. The defendant must plead to the whole of the bill, or a part, and then answer as to the residue. The plea and answer must be distinct, and cannot be mixed together. *Ringgold vs. Ringgold*, 1 *Harr. & Gill*, 12. Here it is impossible to discriminate between what facts are relied on to constitute a plea, and what, to constitute an answer.

On the *sixth* point. If it is a plea and not an answer, it never was replied to. There was no general replication. The case was set down for hearing under the agreement entered into for that purpose. The filing the amended answer, abandoned the plea. What is the effect of a plea, and an answer admitting the facts in the amended bill? There could be no occasion for the plea to the amended bill, as it contains all the facts stated in the supposed plea. *Mitf. Plea.* 254. *Chase vs. McDonald & Ridgely*, 7 *Harr. & Johns.* 178, 197, 198.

Winchester for the appellees. This is an attempt to make the wife's separate estate, answerable for her husbands debt. The trust is express that the property should not be disposed of to pay the debts of the husband. The mortgage to the complainant was acknowledged by *D. Poor* and wife, but she was not privately examined, &c. as required by law. Was the property at the time of the mortgage, liable to the mortgage, or the contract growing out of it? The bill does not speak of the mortgage as a contract growing out of, or within the deed of trust, under the power reserved to the wife to make a contract. The bill is to foreclose a mortgage, and for no other purpose. Is it a mortgage sufficient to pass the estate in the property of a *feme covert*, admitting that it was not trust property? She cannot be considered or regarded as a *feme sole*, capable of making her separate estate answerable for the debts of her husband. 1. The mortgage is not in execution of the power reserved to the wife under the deed of trust. 2. If it is, it is such a defective execution of the power, as this court will not aid. A *feme covert* cannot dispose of her real estate unless agreeably to the act of Assembly; or under some power reserved to her by deed, and in execution of such power. This deed cannot be considered a mortgage; nor is it in execution of the power reserved to her under the deed of trust. The case of *Price & Nisbet vs. Bigham's Ex'rs*, is not similar to the present. There the contract was for improvements to be made on her estate; and there was an attempt by her and her trustee to execute the power reserved to her.—Here the wife could not contract, except in the way pointed out by the trust. She must have united with the trustees in any transfer of the property. It cannot be a contract by a *feme covert*, unless executed agreeably to the act of Assembly, or according to the power reserved to her under the deed of trust. The estates of *femes covert* are strictly protected. This is not such a defective execution of the trust as will be aided by this court. No such case can be found where it was ever done.

The question relative to the plea will occur in another case against the same defendants, and will be there argued. But there is a plea, and there was a general replication to it. The Chancellor says so, and he is presumed to know the state of his own records.

Gill, in reply. The debt due by *Poor* to the complainant, was extinguished by the surrender of the distress. The distress was abandoned at the instance of Mrs. *Poor*, and it then became her debt, for which she contracted to pay the amount. There was as strong an inducement in this case for the wife to enter into the contract, as there was for Mrs. *Price's* contracting in the case of *Price & Nisbet vs. Bigham's Ex'rs.* No particular form of conveyance is pointed out in the deed of trust before mentioned, and the manner in which Mrs. *Poor* might contract, is unlimited. She could act as a *feme sole;* and if so, she need not have been examined apart from her husband on acknowledging the mortgage to the complainant. Her husband need not have been a party to the mortgage. It was valid without his being a party or consenting to it. What is the effect of her covenant in the mortgage? She has covenanted for further assurances to make her mortgage effectual in case of need—and therefore as Mrs. *Poor's* contract can be enforced as if she were a *feme*, admitting the deed to be defective as a mortgage to pass the estate; yet there is such a contract as a Court of Equity, which assumes that done which ought in honesty to be done, can enforce. The Chancellor undoubtedly supposed there was a general replication, but it is believed he adopted that error, from the fact that another case against the same defendants upon the same deed of trust, was before him at the time he decided this, in which other case, there was a general replication and commission—We deny that its existence is to be assumed, because the Chancellor's decree assumes such existence, the mistake in that fact, which might happen to the most cautious under such circumstances, is one of the grounds of this appeal.

Archer, J. delivered the opinion of the court.

It will not be necessary in this case, to determine whether the defence of the defendant is partly an answer, and partly a plea in bar, or whether it is a plea in bar supported by an answer, or, if a plea, whether it is overruled by the answer. These questions not necessarily arising on the record; no replication has been filed, and the cause has been set down for hearing by agreement of counsel upon the proceedings in the case; if it be an answer, upon bill and answer, if a plea, then upon the bill and plea, in either case, all the facts set forth in the bill are admitted to be true, not by setting the cause down for hearing, but by the pleadings in the cause, and if the defence be in fact a plea, the cause having been set down for hearing, the question is submitted on its legal sufficiency to bar the remedy which the complainant seeks.

The facts of the case appear to be, that *Dudley Poor* was indebted to *Luke Tiernan*, in the sum of six hundred dollars, for rent in arrear—That for the purpose of securing the amount due, *Tiernan* levied a distress upon the goods of *Poor*—That to relieve his property from this lien, thus acquired by *Tiernan*, *Poor* and *Wife* agreed with him that they would execute the paper, purporting to be a mortgage, filed with the proceedings, and *Tiernan*, in consideration thereof, agreed to give up his distress—That upon the fulfilment of the agreement on the part of *Poor* and *Wife*, the goods levied upon were given up, and his lien by distress surrendered.

That the property upon which the mortgage operated had belonged to Mrs. *Poor*, and had been conveyed by a deed of trust, on the 24th of August, 1816, by *Poor* and *Wife, to Columbus O'Donnell* and *John H. Poor*, for the sole and separate use of Mrs. *Poor*, during life, and in no wise answerable for his debts and engagements, with a power to her to sell, convey and dispose of absolutely, in such manner as she might think proper to direct, without the concurrence of her husband, and from and after her decease, such parts of the property as should be left undisposed of by her deed or *contract*, was conveyed in trust to her children and their heirs, as tenants in common.

In the case of *Price & Nesbit vs. Bigham's Ex'rs*, the question was presented how far it was competent for a married woman, by a contract under seal, to charge the payment of a debt on her real estate, which was settled on her by a deed of trust for her separate use, with a power to sell and convey and absolutely to dispose of the same, by a deed duly executed by her, her coverture notwithstanding, and in delivering their opinion on this point, the court after stating that by the express terms of the trust, she might pass her lands by deed, and they emphatically ask if this power exist, "how can the power to encumber it by mortgage or charge it by contract, be denied to her?" The law allows her, notwithstanding her coverture, to part from her whole estate, upon the principle, that in doing so, she acts as a *feme sole* as to her separate property, and upon the like principle, and to promote fair dealing, it must be conceded to her to charge and encumber it with her debts.

Whether the instrument of writing which forms the basis of this call, for the interposition of a Court of Equity, be in fact a mortgage, in the legal and technical sense of that term, in consequence of its not having been acknowledged by Mrs. *Poor* in the manner, in which the acts of Assembly require the acknowledgment of *feme's covert* to be made, it is not necessary to determine. Nor do we mean to intimate any opinion upon the subject. For the principle is a well settled and familiar one, that where any instrument of writing is designed to operate as a transfer of property, and proper and apt terms are used whereby the meaning of the parties can be clearly ascertained, if some circumstances are omitted to give it legal validity, whereby it is deprived of its intended specific operation, a Court of Equity will set it up as a contract, or as evidence of a contract, and where the rights of innocent third parties would not thereby be effected, will, as between the parties to such instrument, carry it into specific execution, provided it be founded upon a valuable consideration, 2 *P. W.* 242. The deed in this case was clearly intended to be a mortgage to secure the payment of the complainants debt, and was no doubt meant by the parties to be clothed with all the formalities and solemnities necessary to give it a legal and effective operation as such. Its design and meaning was to secure a particular debt, and to charge it as a lien on the wife's separate property. If it be deprived of legal validity for the want of a privy examination, we are still at liberty to look at it as illustrating and evidencing the agreement of the parties, and will coerce its execution according to that original design. Such a course would be demanded by the first principles of equity. For what could be more inequitable than to permit a party to escape from the fulfilment of his contracts, by the mere omission of legal forms?—in which omission too, he may have been the sole actor, and in all cases a participator, and to allow him to reap the advantages from such omission, of all the consideration which constituted his inducement, for entering into the contract.

A voluntary contract could neither be coerced in equity, nor could advantages from it be obtained at law. And this leads us to the enquiry, whether the consideration here was valuable, and of this there cannot be a question entertained. The admission in the cause shew that the complainant surrendered his lien on the property distrained in consideration of the security, which he and all the parties to it believed he had obtained by the mortgage. It was the mere substitution by consent of one security for another, and if relying on the acts of the parties, he has relinquished a certain indemnity, and is now to be told, that his security taken in return, and intended as an equivalent, is gone, the result would be, that equity would enable them to perpetrate a fraud.

But it is said that the wife was not benefitted by any of these stipulations. It is not necessary that she should have been. It is sufficient, acting with her property as a *feme sole:* that she contracted to pass it for her husband's debts, on condition that a benefit should be bestowed upon her husband, and that the creditor seeking the benefit of this contract, and relying upon it, surrendered an existing security or advantage.

It is not meant to intimate in any thing which has been said, that however the complainant might suffer by a reliance upon the conduct of those with whom he contracted, that the execution of this contract could be enforced against the rights of disposition contained in the deed of trust. That would constitute a paramount law, governing and controling every contract in relation to it, and it need be scarcely necessary to say, that no decree could pass against her to carry into effect any contract she might make, unless such contract were within the limits of her *jus disponendi.*

This is a stronger case in favour of executing the contract, than was the case of *Price & Nesbit vs. Bigham's Ex'rs.* There the power was to pass the estate by deed. Here it is by deed or *contract.* Embracing by the latter term, the power to pass the estate by every kind of agreement known to the law, in which, estates of the description mentioned in the deed of trust, could pass.—As a *feme sole*, she had power to contract with any one, and to bind her estate, and to charge it with such contract. The power is sufficiently large and unrestrained to permit her to contract as security for others, and thus to pass her estate for the benefit of the principal, and to secure to his creditors their debts—she might voluntarily sell her lands, and with the proceeds pay her husband's debts. Why might she not upon a consideration incumber it for the same purpose? There is nothing in the spirit and meaning of the deed of trust in opposition to such liberty; on the contrary, every thing to uphold and confirm it—while it is cautiously guarded against *liability* for her husband's debts, her will and power over it is unrestrained. And if she chooses to exercise a kindness to her husband in discharging his debts, and thus charging her lands upon a sufficient consideration, there is clearly nothing in the intention of the settlement which forbids it. She was never intended to be placed in a state of pupilage with regard to her property, but left free to act as she pleased, with regard to it, as fully and as perfectly as if she had been a *feme sole*, and as if she had the legal title; nor are we bound in order, to give efficacy to her acts, to see that she has sought the counsel of her friends, or solicited the permission of her trustee—such a limitation would restrict her will, in violation of the essence and spirit of the power.

It is supposed that the allegations in the bill do not set up a proper foundation for the interposition of a Court of Equity. The plaintiff's title to the assistance of the court, must always be exposed by the pleadings; but the style and character of pleading in equity has always been of a more liberal cast than that of other courts, as mispleading in matter of form has never been held to prejudice a party, provided the case made is right in matter of substance, and supported by proper evidence. *Cooper Eq. Plead.* 7-8.

The allegations then contained in the original and two amended bills, are in substance these—That the property prayed to be sold was conveyed to trustees in trust for the separate use of the wife of *Dudley Poor*, setting out in substance the uses and trusts to which the property was subjected, it then avers the existence of a debt due from *Poor* to *Tiernan*, that *Tiernan* had surrendered his lien on the property of *Poor*, in consideration of the execution of a mortgage by *Poor* and *wife* on the lands of the wife thus conveyed in trust, which lands thus mortgaged, are prayed to be sold for the satisfaction of the debt. According to our views these averments make out a clear case for equitable interposition. In point of form it *may* not have been strictly correct to treat the instrument of writing in controversy, as a legal mortgage, as it seems to have been done in the original bill. As such it may not be clothed with the necessary legal attributes. If it be not, thus clothed, it is at all events, clearly a contract which equity will treat as a mortgage, and as between these parties, so far as concerns this suit, liable to all the incidents of a strictly legal mortgage, as much so as if all the formalities of acknowledgment, privy examination, and registration, had been pursued.

Entertaining the views we do, we cannot but declare, that in substance, the allegations are correct and sufficient, and the equity clear and unquestionable.

THE DECREE OF THE CHANCELLOR IS REVERSED.

KIERSTED *vs.* THE STATE, use of COSTELLO.
MORROW *vs.* THE STATE, use of ISRAEL.
CHAMBERLAIN *vs.* THE STATE, use of KEILER.

December, 1829.

Where an applicant for a discharge under the acts relating to insolvent debtors, fails to appear according to the condition of the bond taken from him, an action in the name of the State, (the obligee) for the use of a creditor, may be maintained thereon, against the applicant's security in the bond. The pleadings must disclose, that the equitable plaintiff was a creditor of the insolvent, to a certain amount; and the applicant's failure to appear. The amount of the creditor's debt, is the measure of damages; and neither the poverty of the applicant, nor the fact, that no allegations were filed against him by creditors, constitutes a defence thereto.

Obligations in which many persons are interested, may be taken in the name of the State, whenever the law is silent in naming the obligees, to whom they are to be given.

A consistent and uniform practice under various acts of Assembly, passed in relation to the same subject, so fully establishes the contemporaneous construction of the first act in the system, that after twenty years, it has too long obtained, to be shaken and disturbed.

So bonds with condition for the appearance of insolvent debtors, made to the State as obligee, are sanctioned by the uniform practice of twenty years, although the acts of Assembly, under which they are required to be executed, contain no specific provision for making them to the State, and creditors may bring suits on them, for their use, though not expressly authorised by law to sue.

KIERSTED *vs.* THE STATE, use of COSTELLO. Appeal from *Baltimore* County Court. The first of these appeals was an action of debt on a bond executed by *N. Kimball*, an applicant for the benefit of the insolvent laws, with the appellant (the defendant below) as his surety, brought at the instance and for the use of *Costello*, claiming to be a creditor of the insolvent. The defendant pleaded general performance by *Kimball*, to which the plaintiff replied, that *Kimball* was indebted to *Costello* in the sum of $31 64, and that *Kimball* did not make his personal appearance before the judges of *Baltimore* County Court, at &c. on the first Saturday of September term, 1821, then and there to answer such allegations and interrogatories, as his creditors, or any of them, might have filed against him, whereby the plaintiff sustained damage to the amount of $64, &c. The defendant rejoined that *Kimball* was not indebted to *Costello* in the said sum of $31 64, or any part thereof; and that no allegations or interrogatories were ever filed with the said court, to be answered by *Kimball* on the first Saturday of September, 1821, or at any other time, by the creditors of *Kimball*, or any of them. Issue joined.

At the trial, the plaintiff offered in evidence the bond upon which this action was brought, executed by *Nathaniel Kimball* and *Luke Kiersted*, (the defendant) to the *State of Maryland*, on the 31st of January, 1821, in the penal sum of $600, and conditioned as follows, viz. "The condition of the above obligation is such, that if the above bound *Nathaniel Kimball* shall make his personal appearance before the Commissioners of Insolvent Debtors for the City and County of *Baltimore*, at the Court House, in the said city, on the second day of April next, at four o'clock in the afternoon, and answer such interrogatories as may be propounded to him by any of his creditors, agreeably to the act of Assembly, entitled, an act relating to Insolvent Debtors, in the City and County of *Baltimore*, and shall also make his personal appearance before the judges of *Baltimore* County Court, at the court house, in the city of *Baltimore*, on the first Saturday of September term next, then and there to answer such allegations and interrogatories as the creditors of the said *Nathaniel Kimball*, or any of them, may have filed against him, agreeably to the said act of Assembly, and the act, entitled, an act for the relief of sundry insolvent debtors, and the several supplements thereto, and continue in court, until duly discharged, then the above obligation to be void, else to be and remain in full force and virtue in law."

The plaintiff proved the execution of the said bond by the subscribing witness thereto, and then gave in evidence a warrant issued on the 15th of March, 1821, by a justice of the peace of *Baltimore* County, against the said *Kimball*, to answer unto the said *Costello* in a plea of debt, &c. upon which said warrant was thereon endorsed, the following judgment which the plaintiff also offered in evidence.

"Judgment in favour of the plaintiff, for thirty-one dollars debt, and sixty-four cents costs, with interest until paid or satisfied. *March* 20, 1821."

"The above judgment is subject to the defendant's application for the benefit of the insolvent laws, for city and county of *Baltimore.*"

The plaintiff also proved that *Kimball* did not make his personal appearance before the judges of *Baltimore* County Court, on the first Saturday in September, 1821; but did appear before the Commissioners of Insolvent Debtors. The defendant then proved that no allegations or interrogatories were filed by either the said *Costello*, or by any of the creditors of said *Kimball*, either before the Commissioners of Insolvent Debtors or *Baltimore* County Court. The defendant then prayed the court to instruct the jury, that the plaintiff was not entitled to recover. Which instructions the court [*Hanson* and *Ward, A. J.*] refused to give.

The defendant excepted. *Verdict* that *Kimball* did not well and truly observe, perform, &c. all and singular, the articles, &c. in the condition of the writing, obligatory on his part to be performed, &c. and damages assessed to the sum of $37 65. *Judgment* upon the verdict against the defendant, for $600 debt and costs, with a memorandum that the judgment was to be released on payment of the said sum of $37 65, with interest from, &c. and costs. From this judgment the defendant appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN and DORSEY, J.

Mitchell for the appellant contended,—1. That *Costello* had no right to bring this suit. 2. That the refusal of the court below to grant the defendant's prayer, was not authorised by law or the evidence in the bill of exceptions. 3. That the verdict was void in law. 4. That the judgment was erroneous in form and substance.

If the condition of the bond was violated, no individual creditor could bring suit on it; if he could, it must be a creditor for whose debt the insolvent was imprisoned. This bond was given to the State, and no authority is given for its being put in suit for the use of an individual. Suppose there is a judgment given in this case, how are the other creditors to proceed? Can each of them bring a *scire facias* on this judgment; or must suits be brought on the bond for the use of each creditor? One judgment on the bond absorbs it. Where bonds are directed to be given to the State, a remedy is prescribed for suits being brought on them for the use of any individual who may be damnified—Such as on the bonds of sheriffs, executors, and administrators, &c. But there is no general law on the subject, as in *Pennsylvania*. 3 *Yeates*, 345. *Corporation of Washington vs. Young*, 10 *Wheat.* 406. By the act of 1805, *ch.* 110, *sec.* 11, the bond is directed to be given as a security for those creditors only, by whom the insolvent is imprisoned. 1807, *ch.* 150, *sec.* 3. 1808, *ch.* 71, *sec.* 2. 1816, *ch.* 221, *sec.* 2. 1821, *ch.* 250. *Commonwealth vs. Hatch*, 5 *Mass. Rep.* 191. The creditor must show himself to be such, and to what amount he has been damnified. Here the verdict does not find the matter in issue—How much the party was damnified. The issue is taken upon the fact, whether the insolvent was indebted, and whether any interrogatories had been filed; and the verdict is, that the insolvent did not perform, &c. A verdict is void if it does not state what damages have been sustained by the party. 5 *Com. Dig. tit. Pleader*, 524. 7 *Bac. Ab. tit. Verdict* (*M.*) 18, (*R.*) 37. *Hambleton vs. Veere*, 3. *Saund.* 171.

R. Johnson, for the appellee. The objection that *Costello* had no right to bring this action, comes too late, being after verdict. The assent to sue on the bond will be presumed to have been given. *McMechen vs. The Mayor &c. of Baltimore*, 2 *Harr. & Johns.* 41. *In Corporation of Washington vs. Young*, 10 *Wheat.* 409, the corporation refused to give permission to have the bond put in suit. The condition of the bond in question is for the benefit of all the creditors of the insolvent. Ought it to be otherwise? As to the objection to the verdict, it is now too late to object to it. The issue was found by the jury in favour of the plaintiff, but it is incorrectly stated by the clerk. So far as the issue is as to the not filing allegations, it was an immaterial issue; for the creditors were not bound to file allegations until the insolvent appeared. 1 *Chitty's Plead.* 634. 2 *Tidd's Pr.* 813, 814. The verdict ascertains the debt. What ought to be the damages? They must be to the amount of the debt due to the creditor for whose use the action is brought. But it may be said that the bond was not forfeited, there being no allegations filed. The debtor must have appeared according to the condition of his bond, and in his plea in this suit he should have averred that fact. 5 *Bac. Ab. tit. Obligation*, (*F.*) 174. *Archbishop of Canterbury vs. Willis*, 1 *Salk.* 172.

Mitchell in reply. The defendant's pleading that no allegations were filed against the insolvent debtor, goes to the right of the equitable plaintiff to recover. There was no issue joined whether the insolvent debtor appeared or not. In this case, a motion in arrest of judgment would have prevailed; and if so, advantage may be taken of it on this appeal. There should have been proof that permission was given to *Costello* to sue on the bond, as the defendant's prayer to the court was a general one, that the plaintiff could not recover. Here is a judgment, and it is a bar to any other action on the same bond.

MORROW *vs.* THE STATE, use of ISRAEL.—Appeal from *Baltimore* County Court. This second appeal was also an action of debt brought on a writing obligatory entered into, to the State, on the 4th of May, 1821, by *Hugh Ireton* with *William Morrow*, (the defendant below, now appellant) as his surety, in the penalty of $500 conditioned, "that if the said *Hugh Ireton* shall make his personal appearance before the Commissioners of Insolvent Debtors for the city and county of *Baltimore*, at the Court House in the said city, on the 2d of July then next, at four o'clock in the afternoon, and answer such interrogatories as may be propounded to him by any of his creditors, agreeably to the act of Assembly, entitled, 'An act relating to insolvent debtors in the city and county of *Baltimore*.' And shall also make his personal appearance before the Judges of *Baltimore* County Court, at &c. on the first Saturday of September term then next, then and there to answer such allegations and interrogatories as the creditors of the said *Hugh Ireton*, or any of them may have filed against him, agreeably to the said act of Assembly, and the act, entitled, 'An act for the relief of sundry insolvent debtors,' and the several supplements thereto, and continue in court until duly discharged; then," &c. The defendant pleaded general performance, to which, there was a replication stating that the said *Ireton*, on the 4th of May, 1821, made application to the Commissioners of Insolvent Debtors for the city and county of *Baltimore*, for a discharge under the insolvent laws of this State; that the Commissioners then ordered that the said *Ireton* should be discharged, and they did then appoint and fix the 2d of July, 1821, for the appearance of *Ireton*, before them at, &c. to answer such interrogatories as should be propounded to him by any of his creditors; and also did then appoint and fix the first Saturday of September term then next, of *Baltimore* County Court, then to answer such allegations and interrogatories, as the creditors of the said *Ireton*, or any of them might file against him, and to continue in court until duly discharged. That *Beale Israel*, being one of the creditors of *Ireton*, to a large amount, to wit, in the sum of $500, did file with the Commissioners of Insolvent Debtors for the city and county of *Baltimore*, before the said second of July, 1821, to wit, on the first of July, 1821, certain interrogatories to be answered by the said *Ireton*. That the said *Ireton* never did appear before the said Commissioners on the second of July, as aforesaid, or on any other day; and also that the said *Ireton* never appeared before *Baltimore* County Court, but absented himself therefrom, to deceive and defraud his creditors. Of all which premises the defendant, afterwards, &c. had notice. And the said *Beale Israel*, at whose instance and for whose use this suit is instituted, was, by reason of the premises, prevented from suing and holding to bail the said *Ireton*, and hath never since been able to arrest the said *Ireton*, and hath by occasion of the premises, wholly lost his claim as aforesaid, on the said *Ireton*;

and this, &c. The defendant rejoined to the replication that the said *Ireton* did appear before the said Commissioners on the said second of July, 1821, and that he also appeared before *Baltimore* County Court, and did not absent himself therefrom to deceive and defraud his creditors. Issue joined.

1. At the trial the plaintiff gave in evidence the application of *Hugh Ireton*, for the benefit of the insolvent laws of this State, and all the papers connected therewith; and also the docket entries of the Commissioners, in his case. The report of the Commissioners of Insolvent Debtors, for the city and county of *Baltimore*, dated the 22d of September, 1821, stated the following proceedings had before them, viz. the petition of *Hugh Ireton* of the city of *Baltimore*, praying for the benefit of the insolvent laws, dated the 4th of May, 1821. A schedule of his property, real, personal and mixed, excluding the necessary wearing apparel and bedding of himself and his family, amounting (being household and kitchen furniture,) to $40. A list stating that there were no debts due to him. A list of his creditors, and among others *Beale Israel*, $41 66. The whole amount of his debts as stated, being $224 03. All of which was sworn to by the petitioner. Proof of the necessary residence of *Ireton* in the State, and that he was in custody, &c. The Commissioners then appointed and fixed the 2d of July then next, for the personal appearance of *Ireton* before them, at &c. "to answer such interrogatories as may be propounded to him by any of his creditors;" and they also appointed and fixed the first Saturday in the next September term of *Baltimore* County Court, for the final appearance of the said insolvent before the said court, "to answer such allegations as may be made against him by his creditors, or any of them, and for the final hearing of his said application." The bond entered into to the *State of Maryland*, by *Hugh Ireton* and *William Morrow*, on the 4th of May, 1821, in the penalty of $500, and conditioned for the personal appearance of *Ireton* before the Commissioners, and before *Baltimore* County Court, on the respective days before mentioned. Also the bond entered into by *Thomas Power* with *William Morrow*, as his surety, to the *State of Maryland*, on the 4th of May,

1821, in the penalty of $500, reciting that the said *Power* had been appointed by the Commissioners, provisional trustee to take possession, for the benefit of the creditors of *Ireton*, of all his property, &c. and conditioned that *Power* well and faithfully perform the said trust, &c. Also a deed of conveyance, dated the 4th of May, 1821, executed by *Ireton* to *Power*, the provisional trustee, conveying all his property, &c. The certificate of *Power*, the provisional trustee, that he had received from *Ireton* all his property, &c. Then follows the personal discharge of *Ireton*, granted to him by the Commissioners. Certain interrogatories were then stated to have been propounded to *Ireton* on the part of *Beale Israel*, to which, answers were given by *Ireton*, and sworn to by him, on the 11th of July, 1821. The Commissioners then further reported to *Baltimore* County Court, "that having diligently inquired and examined into the nature and circumstances of the said application, it appears upon such examination, that the said *Ireton* hath not complied with the terms and conditions of the said insolvent laws," &c. Whereupon it was considered and adjudged by *Baltimore* County Court, on the 22d of September, 1821, that the said *Ireton* was not entitled to the benefit of the acts of Assembly for the relief of insolvent debtors; and that, therefore, the prayer of the said petitioner ought not to be granted. The docket entries of the Commissioners on *Ireton's* petition, given in evidence as before mentioned, show that "the petition was filed on the 4th of May, 1821"—"*Thomas Power* was appointed provisional trustee"—that "the petitioner was to appear before the Commissioners, to answer interrogatories on the 2d July, 1821, and to appear before *Baltimore* County Court on the first Saturday of September term, 1821, for final discharge. His "personal discharge was filed," and "an order for publication delivered to the printer." On the "12th of May, 1821, interrogatories were filed—Answer filed." On the "2d of July, 1821, the petitioner appears—Provisional trustee continued. 22d of September, 1821, *no appearance*—No benefit." The plaintiff then proved that the said *Ireton*, at the time of his said application, was, and still is, indebted to the said *Israel*, in the sum of $41 66. The defendant then prayed the court to direct the jury upon the foregoing evidence, that the plaintiff was not entitled to recover. Which direction the court [ARCHER, Ch. J. and *Hanson* and *Ward*, A.J.] refused to give. The defendant excepted.

2. The defendant then offered evidence to prove that the said *Ireton*, before, and at the time of his application, as set forth in the foregoing bill of exceptions, was extremely poor, and had no other property than that conveyed to his trustee, under the deed of trust aforesaid. To the admission of which evidence, the plaintiff objected. Which objection the court sustained. The defendant excepted; and the verdict being for $51, and judgment thereon rendered, for the penalty of the bond, &c. he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

Williams, (District Attorney of *United States*.) The points for the consideration of the court are—1. Whether the appearance bond of the insolvent debtor, has been legally given?

2. Whether the *cestui que use* can recover more than nominal damages, if he proves no damages? And he gave no evidence that he was damnified by the forfeiture of the bond.

3. The evidence offered by the defendant that *cestui que use* was *not* damnified, was rejected by the court below.

4. The damages should have been nominal.

1. No bond to the *State* is valid, unless given pursuant to some act of Assembly. *Owings vs. Norwood, 2 Harr. & Johns.* 108, (*note.*) The bond to be given by a trustee, under the act of 1805, *ch.* 110, *sec.* 4, is expressly required to be given to the *State.* But the bond required by the *eleventh section* to be given by the insolvent debtor for his appearance, &c. is not required to be so given—it is not said to whom the bond is to be given. By the act of November, 1788, *ch.* 17, *sec.* 5, the trustee of an insolvent debtor was required to give bond to the State. By the act of 1791, *ch.* 73, *sec.* 3, the trustee to give bond to such person as the Chancellor should direct; and the

Chancellor directed such bonds to be given to the Attorney General. The same provision is contained in the act of 1792, *ch.* 67, *sec.* 3. By the *tenth section* of that act, an imprisoned debtor, if required by the Chancellor, was to give bond: but it is not said to whom such bond was to be given. The practice seems to have been that the Chancellor directed the bond to be given to the sheriff of the county in which the debtor resided. Similar provisions are contained in the acts of 1793, *ch.* 68, *sec.* 3, 10. 1794, *ch.* 72, *sec.* 3, 10. 1795, *ch.* 82, *sec.* 3, 10. 1796, *ch.* 70, *sec.* 4, 11. By the act of 1797, *ch.* 82, *sec.* 7, the bonds of the debtors are to be given to the trustees. The act of 1797, *ch.* 97, *sec.* 4, 11, contains the same provisions as the act of 1796, *ch.* 70, *sec.* 4, 11, &c. Similar provisions are also contained in the acts of 1798, *ch.* 64, *sec.* 4, 11, and 1799, *ch.* 88, *sec.* 4, 11. By the act of 1804, *ch.* 110, *sec.* 4, trustees were required to give bonds to the *State.* By the *eleventh section* of that act, imprisoned debtors, if required by the County Court, &c. are to give bonds with security, for their appearance, &c. but it is not said to whom such bonds were to be given. The act of 1805, *ch.* 110, *sec.* 4, 11, has the same provisions. The same expressions will be found in the act of 1808, *ch.* 71, *sec.* 2. We come now to the act of 1816, *ch.* 221, *sec.* 2, whereby the Commissioners of Insolvent Debtors for the city and county of *Baltimore*, are required to take a bond for the petitioner's appearance, &c. "with security to be by them approved." From all the preceding, it will be seen that there is no provision of law which authorises the giving of a bond by a petition for the benefit of the insolvent laws, to the *State of Maryland.* The bond of a trustee of an insolvent debtor is expressly provided to be *for the use of the creditors* of the insolvent, whereas the bond to be given by the debtor is not provided to be *for such use.* No suit can be maintained on a public bond, unless the law provides that persons damnified may bring suit on any such bond. This was the argument in *M'Mechen vs. The Mayor, &c. of Baltimore*, 3 *Harr. & Johns.* 534. See the acts 1794, *ch.* 54, and 1798, *ch.* 101, *sub-ch.* 3, *sec.* 10, *sub-ch.* 12, *sec.* 5. And as analagous, he referred to 3 *Saund.* 412, 415 (*note.*) 1 *T. R.* 287.

Kerr vs. The State, 3 *Harr. & Johns.* 560. *Ellicott vs. The Levy Court, &c.* 1 *Harr. & Johns.* 359.

2. The bond being given that the insolvent debtor shall appear, &c. cannot be for the benefit of the creditors, if he does not appear. At all events, the debtor failing to appear cannot subject the surety to the payment of all the debts due to creditors. In an action on a bond with a collateral condition to secure third parties, there ought to be some evidence of damage; or else, why should the plaintiff be permitted to sue? What interest has this creditor in this bond, (his name not appearing in it,) except because he is damnified by the non-appearance of his debtor? He ought to have given some slight evidence of injury sustained by the forfeit of the bond. It would be a violent presumption, *without* evidence and against evidence, to presume that he is damnified to the whole amount of his debt. And not he only, but all the other creditors. So that the surety of an insolvent debtor is to be overwhelmed, because, to relieve his friend from imprisonment, he is his surety for his appearance. He may be, and no doubt, universally, sureties become so, because they know their principal is worth nothing or little, and, therefore, they can be very slightly injured by the forfeiture of the appearance. There is nothing in the law analogous to this doctrine. For with regard to special bail, or rather sureties in a bail bond, the presumption is, that the debtor is able to pay the debt, from which he absconds. But it is otherwise with respect to insolvent debtors.

3. But suppose the presumption not to be so in ordinary cases. In this case evidence was offered and rejected, to show actually that the principal had nothing, and, therefore, the creditor could have recovered nothing. All that could be done was to *imprison* him. This would be no satisfaction of the debt, but merely a *penalty* for fraud. Under our insolvent laws, imprisonment is no satisfaction for debts. It is used to coerce debtors to give up their property, and as a punishment for fraud. Here the proof is, that the debtor had given up all his property, *of course*, all that could be done would be to imprison him.

4. If there was such a privity between this creditor and the obligors in the bond, that being forfeited, he could sue on it. Still if he was not actually damnified, he was only entitled to nominal damages. By the act of 1821, *ch.* 250, provision is made for the enlargement of the time for the appearance of the debtor, without requiring a new bond, and without the consent of the creditors. What then becomes of the old bond? 5 *Johns. Rep.* 42. 9. *Johns. Rep.* 300. 10 *Johns. Rep.* 563. 2 *Johns. Rep.* 205.

Meredith, for the appellee.

This suit was brought in the name of the state, for the use of one of the creditors of an insolvent, against his surety, in a bond given for the appearance of the debtor, in pursuance of the act of 1816, *chap.* 221, *sec.* 2.

In the argument on the part of the appellant, it was made a question whether there could be any recovery on the bond in this case, since there is no specific provision in any part of the law referred to for taking bonds of this description in the name of the State; and it is upon this question alone that the counsel for the appellee, will detain the court. It is certainly true, that the act in question does not designate the obligee in these bonds. After providing for the appointment of the provisional trustee, the section above cited, proceeds to direct, "that the Commissioners shall take bond, with security, to be by them approved, for the appearance of such insolvent, to answer such interrogatories as may be propounded to him by any of his creditors, or such allegations as may be filed against him, within the time hereinafter mentioned." But, in the similar provision, which is to be found in the acts of 1805, *ch.* 110, *sec.* 11; 1807, *ch.* 150, *sec.* 3; 1808, *ch.* 71, *sec.* 2; and 1817, *ch.* 183, *sec.* 1, there is no more particular designation of the obligee, than in the act of 1816; and yet the invariable practice has been from the passage of the first general insolvent law in 1805, to the present period, to take the appearance bonds of insolvent debtors in the name of the State, and the legality of doing so, it is believed, has never before been questioned. A construction, therefore, thus given by the courts throughout the State, and uniformly acted upon for upwards of twenty years, in the innumerable cases which have arisen under the insolvent law, should not be disturbed but for the strongest and most unanswerable reasons. Where the interpretation of a law is doubtful, the exposition given to it immediately after its passage, when the intention of the Legislature is more certainly ascertained than at a later period, is entitled to great consideration, and generally is deemed decisive. *Contemporanea expositio est fortissima in lege.* 6 *Bac. Ab.* 385. Again, it is a rule in the construction of statutes that such an interpretation ought to be given as will prevent the object of the law from being defeated. 15 *Johns. Rep.* 358. If the objection to the bond in this case is a valid one, it is manifest that the provision which the Legislature intended for the security of creditors is rendered wholly inoperative. For if the bond cannot be rightly taken in the name of the State, because it is not so specifically directed, it cannot for precisely the same reason be taken in the name of any other obligee. And thus creditors are left without any security whatever, and the intention of the Legislature, which is obviously to substitute the appearance bond in the place of special bail, is completely frustrated. Legislative intention is often resorted to, to explain the meaning of laws. 15 *Johns. Rep.* 358. *That* intention may be collected from other provisions in the same law, and looking to the provision with regard to the trustees bond, which is expressly directed to be taken in the name of the State by the act of 1805, it would seem that the Legislature must have intended that the appearance bond should also be given to the State, or they would have otherwise directed. Why should the one be taken in the name of the State and not the other? They are both for the security of creditors; the State, is not interested, but selected merely as a safe and permanent trustee for their benefit. Having once mentioned the form of a bond, it was not thought necessary to repeat it. And it may be remarked, that in the act of 1808, *ch.* 71, *sec.* 3, where both the trustees bond, and the appearance bond are mentioned, there is no specific direction as to either, with regard to the obligee; and yet it will scarcely be doubted, that a trustees' bond is under this law, which is the last upon the subject, properly and legally given in the name of the State. If, however, the bond in this case is not considered as being authorised by the act of 1816, in connexion with the preceding insolvent laws, the appellee insists that it is still a good bond at common law, and that the State ought to be regarded as a trustee for the creditors, for whose benefit it was intended. This principle will be found to have been repeatedly settled in *England* and this country. The court, however, is particularly referred to. 2 *Strange*, 1137. 12 *Mass. Rep.* 367. *Addison's* (*Penn.*) *Rep.* 72, 84. That creditors may sue upon bonds of this description, notwithstanding there is no particular provision to that effect in the law under which they are given, the court is also referred to 4 *Dall. Rep.* 95. 5 *Mass. Rep.* 91, and *M'Mechen vs. The Mayor, &c. of Baltimore*, 3 *Harr. & Johns.* 534. See also 1 *Binney's Rep.* 370, as to the priority of those who first sue on official bonds, &c.

CHAMBERLAIN *vs.* THE STATE, use of KIELER. This third case was an appeal from *Frederick* County Court, and also an action of debt on a writing obligatory entered into on the 24th of June, 1818, by the defendant, (now appellant,) with *David Wagner* and *John Gilbert* as his sureties, to the State in the penalty of $1000, and conditioned for the appearance of the defendant in *Frederick* County Court on the first Monday of November then next, to answer the allegations of his creditors according to the provisions of an act of Assembly, entitled, "an act for the relief of sundry insolvent debtors, passed at November session, 1805, and the supplements thereto," and shall not depart the said court without the leave thereof. The defendant pleaded.—1. That the action ought not to be maintained, &c. because no creditor or creditors of the defendant at any time from the time of the making the said writing obligatory to the time of the commencement of this suit, made any allegation or allegations in *Frederick* County Court against the defendant, according to the provisions of the act, entitled, &c. or the supplements thereto, or any of them; and this he is ready to verify, &c. 2. That the action ought not to be maintained for the use of *George Keiler*, because the said *Keiler* did not at any time from the making of the writing obligatory aforesaid, to the commencement of this suit, make any allegation or allegations in *Frederick* County Court against the defendant, according to the provisions of the act of Assembly, entitled, &c. or of the supplements thereto, or any of them; and this he is ready to verify, &c. 3. That the defendant did make his personal appearance in *Frederick* County Court on the first Monday of November next ensuing, the date of the said writing obligatory, to answer the allegations of his creditors, according to the provisions of the act, &c. and did not depart the said court without the leave thereof; and this he is ready to verify, &c. To the first and second pleas there were general demurrers. To the third plea, a replication that the defendant did not make his personal appearance, &c. And that *George Keiler* was a creditor of the defendant to the amount of $61 96. Issue tendered and joined. The County Court ruled good the demurrers to the first and second pleas. Verdict on the issue to the replication to the third plea for the plaintiff. Judgment on the verdict, and the defendant appealed to this court.

The cause was argued before Buchanan, Ch J. and Earle, Archer and Dorsey, J.

Taney (Attorney General of *Maryland*,) and *Ross*, for the appellant.

The act for the relief of insolvent debtors, 1805, *ch.* 110, and its several supplements, have for their object, the relief of insolvent debtors who comply with the provisions of those acts. The bond required by those acts (vide the act of 1807, *ch.* 150, *sec.* 3,) manifestly shews that the condition of the bond was, to answer allegations if filed, but not to make the debtor and his securities answerable to creditors who had no allegations to make against the debtor. If the insolvent was a delinquent, and against whom the creditors thought they had a right to complain, *and did complain in the form of allegations*, then the condition of the bond was forfeited by the non-attendance of the insolvent debtor. As no allegations were filed in this case, it is proof that the insolvent debtor fully complied with the provisions of the insolvent laws; for it was not necessary, to enable the creditors to file allegations, that the insolvent debtor should be present. The condition of his bond was, to answer the allegations of his creditors, but if they have no allegations to make, or if they had, and made none, how can they derive a right for the non-performance of a condition, the breach of which was attended with no loss to them, nor invaded any of their statutory rights? To enable the creditors to recover on the insolvent debtors' bond, they must show they filed allegations against the petitioning debtor, and that he did not personally appear to answer those allegations as the condition of his bond required him to do.

Pigman, for the appellee. By the argument of the appellant's counsel, it appears that the appellant contends that he is not liable to any creditor on his insolvent bond, as no allegations were filed against him. Now it is evident it was the intention of the act of Assembly, that the *appearance* of the insolvent should *precede* the *filing allegations*. The allegations are pleadings and could not be filed so as to call on *Chamberlain* to join issue until he was in court. The proper authority discharged him out of custody upon his bond to *appear to answer allegations*, evidently to come into court first, to enable the creditors to file allegations. If the words of the act of Assembly are particularly attended to, this will appear clearly to be the proper construction; and this construction the court below gave the words of the act of Assembly. It appears in the record that *Chamberlain* did not appear; of course, the condition of his bond was broken.

Earle, J. delivered the opinion of the court, in the three preceding cases.

We propose to give a condensed view of these cases, and to decide them together. For although their pleadings are a little variant from each other, they have all originated in the same kind of cause of action, and the principal questions presented by them on the argument are the same.

They are suits upon obligations given by insolvents to the State, conditioned to appear at certain times and places, to answer the interrogatories and allegations of their creditors, to be filed against them, which in each court were decided adversely to the obligors.

The first and chief question, arising out of them is a consideration whether actions can be maintained on these obligations, inasmuch as they have been taken in the name of the *State of Maryland*, and no express authority is given by law so to take them.

The act of 1805, *ch.* 110, is the first general insolvent law enacted, in this State, to which there have been many supplements; and since then various insolvent acts to suit the situation of the city and county of Baltimore, have been passed. All have been examined by the court, as well as some in favour of individuals, before and since 1805. In none of those acts is there any specific provision for taking these bonds of the insolvents in the name of the State, although by the act of 1805, and several other acts, the courts, judges and commissioners, are to take of the imprisoned debtors, at the time of their discharge, bonds conditioned for their appearance to answer the allegations of their creditors, in penalties to be prescribed, and with security to be approved of by them. Notwithstanding the manner of taking these bonds, is no where specifically directed; we are assured, upon full inquiry, that they have been invariably passed to the *State of Maryland*, for more than twenty years past, whether taken by the courts, the judges, or the Commissioners of Insolvent Debtors for the city and county of *Baltimore*. What has produced this uniformity, it is not easy to say, unless it has been brought about by implicitly following the example of the courts and judges, upon whom it first devolved to execute these acts of Assembly. As no person was designated, in whose name the bonds were to be given, it is probable the courts and judges were prompted to the course pursued by the consideration, that the law in this particular could not be executed, without an obligee was supplied by them, and by reflecting, that for permanency and convenience, none could be selected, more suitable than the State itself, to which all official bonds were given, and other kinds of bonds, where a multiplicity of persons are concerned. And it may be, that they were conducted to this resolution, by reasoning upon the supposed intention of the Legislature, that these bonds should be taken in the name of the State, from the fourth section of the act of 1805, *ch.* 110, which directs the trustees of insolvents to give bond to the State. Whatever may have led to the practice, its consistency fully establishes the cotemporaneous construction of the first act, in this system of laws, and we think it has too long obtained, to be at this time shaken and disturbed. And we further think, that to promote the execution of similar legislative provisions, it may be well received as a settled rule for the government of our courts of justice, that obligations in which many persons are interested, be taken in the name of the *State of Maryland*, whenever the law is silent in naming the obligees to whom they are to be given.

Another question insisted on by the appellants in the argument of this cause is, whether the appellees could sue these bonds for their use, there being no provision in any of the insolvent acts, to enable them thus to sue. This point we consider settled in this court, by the cases of *McMechen vs. The Mayor and City Council of Baltimore*, use of *A. Storey*, and *McMechen vs. The Mayor and City Council of Baltimore*, use of *Hollingsworth, & Williams*, 2 *Harr. & Johns.* 41, and 3 *Harr. & Johns.* 534. They were suits on an auctioneer's bond, taken under an ordinance of the city, which did not authorise any person, in particular, to sue it. They were nevertheless sustained, and the judgment of the County Court therein, affirmed by this court.

A still further question was moved on the argument of this case, by the appellant's counsel. They contended, that if those obligations were liable to be sued by the appellees, nothing could be recovered by them but nominal damages. Upon this subject, we are of opinion, there is very little room for doubt. In directing these bonds to be taken, the Legislature must have had in view the interest of the creditors of the insolvents, and not merely to authorise them to sue, to run the insolvents and their securities, to useless costs. To give them additional security for their debts, by obliging the insolvents to enter into stipulations, in nature of bail bonds, was the object; and the amount of their individual demands, we should think, must be the measure of the damages to be recovered by them respectively. These cases were partly argued upon notes, which were not filed until the close of the last term, and could not have been earlier disposed of by us. They appear to have been properly decided in every respect, by the County Courts, and we affirm their judgments, concurring with them in the opinions expressed on the exceptions, in the two first, and on the demurrers in the last case.

JUDGMENTS AFFIRMED.

GIRAUD'S Lessee *vs.* HUGHES, *et al.*—*December*, 1829.

It is true as a general principle, that the lines of a tract of land originally run by course and distance, without calls, must be confined to the course and distance, and cannot be extended beyond them.

Where a tract of land lies adjacent or contiguous to a navigable river, or water, any increase of the soil, formed by the water gradually, or imperceptibly receding, or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land. It is not upon the principle that the land calls for the water, but, because it adjoins the water, that the owner acquires a title to the soil so formed.

In ejectment it appeared that the land for which the action was brought, and which had been recently patented as vacant land, had been formed by the gradual recess of the waters on the shores of the river *Patapsco ;* and that another tract of land the lines of which ran into, though they did not call for the water, where the recession took place, had been patented many years before. The defendant claiming title under the grant of this last tract, HELD that the action could not be sustained.

The Port Wardens of *Baltimore* by the act of 1783, ch. 24, were authorised to grant permissions to make wharves, but in order to vest a title in any such wharf, it is essential by the provisions of the act of 1745, ch. 9, sec. 10, that the grantee should have completed it according to his permission.

Appeal from *Baltimore* County Court. Ejectment for a tract of land called *Augustus's Discovery Resurveyed.* The defendants (now appellees) took defence on warrant, and plots were returned. Not guilty was pleaded and issue joined. The plaintiff made claim and pretension for all that tract or parcel of land, called *Augustus's Discovery Resurveyed*, as located on the plots. The defence was taken under the patent of a tract of land, called *Gist's Inspection*, and for certain land lying between the 9th and 10th lines of said tract, as originally surveyed, and the present shores of the river *Patapsco*, which land was covered by the plaintiff's claim. This action was originally instituted against *Christopher Hughes*, and upon his death, his heirs at law, the present appellees, were made defendants.

The plots returned and filed in this cause, showed that the 9th and 10th lines of *Gist's Inspection*, (being on the N. E. corner, and *Eastern* side of said tract) according to their original location, run into the water of the river *Patapsco*:—That the part of said tract conveyed by *J. M. Porter* to *Christopher Hughes*, was also adjacent to the water, and of, the *Northern* and *Eastern* parts of the whole tract:—That the part of *C. Hughes*' purchase which he conveyed to *Leonard Harbaugh*, was in fact bounded by the waters of the *Patapsco* on the N. and E., by *Montgomery* street on the south, and by *Hughes*' purchase from *Porter* on the *West*:—That a certain permission which the *Port Wardens of Baltimore* in the year 1786, granted to *Leonard Harbaugh* to make a wharf, commenced to the N. and W. of his purchase from *Hughes* (at the beginning of *Hughes*' purchase from *Porter*, and at the *East* side of *Henry* street) and extended from such beginning, first N. then E. (being to the *North* of one of the lines of the lot which *C. Hughes* then owned, and extending nearly parallel with and along its whole *Northern* front on the river) then *South*, and then *West*, until it reached the shores of the *Patapsco* at the S. E. corner of *Harbaugh's* lot, and the intersection *North* side of *Montgomery* street with the water:—that the said wharf, as far as actually constructed, did not include more of the shores of the *Patapsco* than were immediately adjacent to the water lines of *Harbaugh's* lot, purchased from *Hughes;* and was much less extensive than the permission from the Port Wardens, not extending either so far *North* or *West* as the lines of that permission purported to authorise:—That the tract of land called *Augustus's Discovery Resurveyed*, lay to the N. and E. of the 9th and 10th lines of *Gist's Inspection*, and clear of those lines and clear of that tract as originally run according to the courses and distances of the patent—that *Augustus's Discovery Resurveyed*, covered a considerable part of the space, included in the lines of the permission of the *Port Wardens* to *Harbaugh*—That the shores of the river *Patapsco*, when the action was brought, ran along those outlines of *Augustus's Discovery Resurveyed*, which are adjacent to the water—and that the shores of the said river had in fact been extended from *West* to *East*, the distance from the *East* outlines of *Gist's Inspection*, to the *East* outlines of *Augustus's Discovery Resurveyed*, since *Gist's Inspection* was originally surveyed.

1. At the trial the plaintiff gave in evidence a patent to himself for the tract claimed by him, dated in 1813, and proved its location on the plots, to be correct—and he also proved that *Augustus's Discovery Resurveyed*, according to its true location, ran clear of the *original* lines of *Gist's Inspection*, which was the elder tract. And that the tenth line of *Gist's Inspection*, mentioned and called for in the said patents, was correctly located on the said plots—that the beginning of a tract of land called *Augustus's Discovery*, was correctly located, and that the beginning of the tract of land called *Augustus's Discovery Resurveyed*, was also correctly located, and that the beginning of both of the said tracts is in the said tenth line of *Gist's Inspection.* And he also offered in evidence a patent for the tract of land called *Gist's Inspection*, bearing date on the 9th of July, 1732, which contained no call for the waters of the *Patapsco*—that it is correctly located—and that *Montgomery* street is correctly located upon the plots. The defendants then proved that one *John Mercer Porter*, on the 6th of June, 1782, was seized in fee simple of the said tract of land called *Gist's Inspection*, at which time he conveyed to *Christopher Hughes* part of the

said land, the lines of which part on the north and east sides, in fact, ran into the river *Patapsco*, and offered evidence that the same is truly located—and also gave evidence, that the said *Hughes* took possession under said deed of the land so conveyed to him. The plaintiff then read in evidence a lease from said *Hughes* to one *Leonard Harbaugh*, for part of the said *Hughes*, the defendants purchase, from *Porter*, lying adjacent to the water on the *north-east* and *eastern* lines thereof, leaving the said *Hughes*, however, one line on the *north side* of his lot purchased from *Porter*, adjacent to the shores of the river *Patapsco*—And that the said *Harbaugh*, in the year 1786 or 1787, commenced the building of a wharf at the said lot, and continued working at the same till the year 1789, when he quit working there, and abandoned the property; and that said *Hughes* then took possession of the same, and by himself, his tenants, and the defendants his heirs at law, have held it ever since; and that the said *Harbaugh* had laid and extended the logs of said wharf as the same are located on the plots, and had the same filled up in the middle and north side thereof, and partly so on the east and south part of the same; that the logs of said wharf, so made, have by injuries and decay in several parts, fallen down, (the top log entirely around,) and have not been repaired since; that part of the ground filled up within said logs, has been, and still is used and occupied as a Distillery of Turpentine, and that the water flows all around over the logs of said wharf, and within the same from ten to twenty feet according to the state of the tides. The defendants then offered evidence by *William Patterson* and *Samuel Smith*, witnesses sworn and examined, that they were members of the *Board of Wardens* for the port of *Baltimore Town*, in the years 1785 and 1786, and for some time after—that all the other members of the said board, at that time, as also their then clerk, are since dead. That the said board had, at that time, a common seal, which had been adopted, and was used by the said board, that it was the general custom and practice of the board, to direct and have their official acts or proceedings, when given out to individuals, regularly signed and attested under the seal aforesaid, that they have no knowledge what has become of the said seal, or whether it is in being at this time or not. And also offered evidence by *John Purviance*, Esq. that he was clerk to said *Board of Wardens* in the year 1795, and for some time previous; that the said Board, during the time of his being clerk, had and used a common seal to attest their official acts and proceedings, which he understood and believed to be the same which the Board first adopted. That when he resigned his clerkship, the said seal, with the books and papers of the Board, were given over to his successor—And also proved by the same witness that one *Samuel Vincent*, who is now deceased, was the last clerk to the said Board, whose powers ceased in the year 1797, when the act incorporating the *Mayor and City Council of Baltimore*, went into effect and operation. And also proved by the same witness, that *Richard Moale*, who was the first Register, and *James Calhoun*, who was the first Mayor, have both been dead several years. And also offered in evidence by *Emanuel Kent*, examined as a witness, that he is and has been, for about two years past, the Register of the City of *Baltimore*, and as such Register it belongs to him to have the care and keeping of the public books, papers and proceedings of or belonging to the Mayor and City Council of *Baltimore*, and also those of the former Boards of Commissioners of *Baltimore Town*; the special Commissioners and Wardens of the port of *Baltimore Town*, and the seals of the said Commissioners, if any are in being. That he has no knowledge of the seal used by said Board of Wardens—that he hath never seen it—that he hath enquired and examined for the said seal in his office, and it cannot be found there or any where else, that he knows of, and also proved by the said witness, that a book which he now produces, came into his care and keeping as Register, when appointed, from his predecessor in office, and is one of the public books of the Mayor and City Council of *Baltimore*, and is by him believed and considered to be what it purports to be, a book containing the proceedings of the former Board of Wardens of the port of *Baltimore Town*. And also proved by the said witnesses, *Patterson*, *Smith* and *Purviance*, that the said book is the original book that was kept by the said Board of Wardens, in which were made and contained minutes and entries of their acts and proceedings. And also proved by *John Eager Howard*, that the said *Leonard Harbaugh* removed from the State of *Maryland* to the City of *Washington*, in the year 1791, where he resided until his death, two years or more since, except about two years whilst he was in *Frederick* county, and for a short time in *Baltimore*, and returned to *Washington*. The defendants then offered to read in evidence the following entries made in the said book, to wit: "At a meeting of the Wardens of the Port of *Baltimore*, July 5th, 1785, present *Samuel Smith*, *Richard Ridgley*, *John Sterett*, *William Patterson*, *Samuel Purviance*, Chairman—the board received the application of Mr. *Leonard Harbaugh* for permission to extend a wharf on *Luns' Point*, according to the plan annexed to his petition, which was read and ordered to lie for further consideration." "At a meeting of the Board of Wardens for the Port of *Baltimore*, September 28, 1786, present *Samuel Purviance*, *William Patterson*, *Samuel Smith*, *Thomas Russell*, *Thomas Elliot*, *Daniel Bowly*, the board having taken into consideration the application of *Leonard Harbaugh*, for extending his wharf on *Luns' Point*, agree that he be permitted to extend the same to the following courses and lines laid down as limits, viz: Beginning at a stone set up at the present waters edge at the east side of *Henry* street, marked C, H, No. 45, and running north two degrees, west eight perches, then north eighty-eight degrees, east twenty-eight perches, then south fifty-six degrees thirty minutes, east ten perches and one quarter of a perch, thence south thirty-nine degrees forty minutes, east ten perches and one quarter of a perch, thence south twenty-three degrees, east ten perches and one quarter of a perch, thence south ten degrees fifteen minutes, east five perches and a half a perch, thence south eighty-eight degrees, west parallel with the second line until it intersects the shore on the north side of *Montgomery* street,—ordered that permission be granted accordingly,"—As the best evidence now to be had of the matters set forth and contained in the said entries, and for the purpose with the other evidence of the better enabling and authorising the jury to presume and find that permission as stated in said last entry, had been in due form of law granted by the said board to said *Harbaugh*, to build a wharf as therein stated—And also proved that the lines of the permission in the said entry mentioned are truly located on the plots. The plaintiff objected to the admission of the said entries in the said books as evidence, and did also object to the admission of all the said parol evidence about the said seal, and did then and there assert before the court, that the said evidence was not proper to go to the jury. But the said court [HANSON and WARD, A. J.] did then and there declare and deliver their opinion that the said evidence, on the part of the defendants, ought to be admitted, and did permit and suffer the same to go to the jury. The plaintiff excepted.

2. The plaintiff in addition to the matters contained in the *first* bill of exceptions, further offered in evidence, a verdict and judgment rendered between the same parties in this court at the present term for a part of the hereinbefore mentioned tract or parcel of land called *Gist's Inspection*. The defendants then in addition to the matters before offered in evidence by them, proved that from fifty to fifty-five years ago, the shore of the basin of Baltimore, passed at common tides as located on the plots in this cause, in the most western position of said shore, from a small plank enclosure on the south side of *Montgomery street*, standing at the east end of a brick distillery of the lessor of the plaintiff, and running thence northwardly near a pump now standing, and thence passing between two stones on the north side of *Hughes street*, at the intersection or corner of that street and *Leonard street*, which several objects were pointed out by the witnesses to the surveyor in making the survey in this cause. And they also proved by a certain (*Gould*) that he when a boy, had paddled about in a canoe on the shoal water of the said basin, at or near where said pump now stands. It was then admitted by the parties, "that the several water lines or shores located by either party in this cause, show and designate where the tide water of the *Patapsco river* or basin of *Baltimore* flowed at different periods of time, *receding gradually eastwardly to where*

the same now are shown by the most eastward location thereof, on the plots, and that the lines of *Gist's Inspection* when the same was granted, including part of the sixth line thereof, from the end of said line, ran into the water of the *Patapsco* or basin of *Baltimore Town*, to the end of the tenth line thereof; and that the above lines are so located, except a small part of the south end of the tenth line." The defendants then prayed the court to instruct the jury, that if they believed the matters so offered in evidence, the plaintiff was not entitled to recover. Which instruction the court gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE and STEPHEN J.

Learned, for the appellant contended, 1. That thea ppellant (the plaintiff below) derives his title to the land in dispute from the *State of Maryland*, in whom the title was at the time of the grant to his lessor.

2. That the patent for *Gist's Inspection*, under which the defendants claim to hold said land, contains a course and distance location only, and the land in dispute lies entirely without the lines of that tract.

3. That the defendants cannot extend their lines of the tract of land called *Gist's Inspection*, so as to take in any alluvial formations, without the lines of said tract according to its course and distance location, as laid down upon the plots. The patent not having called for the water in a single point.

4. That the lines of the deed from *Mercer Porter* to *Hughes*, for a part of the tract of land called *Gist's Inspection*, cannot pass a title to any land lying without the lines of the whole tract, according to its course and distance location; but that the second line of *Porter's* deed to *Hughes* must terminate at the outlines of the original tract.

5. That land covered by navigable water belongs to the State, and is the subject of a grant; subject however to the common use of fishing and navigation, &c.

6. That there is no alluvial formation appurtenant to the land in dispute in this cause, to which the defendants can claim title as riparian proprietor, so as to enable them to follow the recession of the water of the basin.

7. That by the act of Assembly the permit of the Port Wardens of *Baltimore*, to build a wharf, was contingent in its effects, and did not divest the State of its title to the land covered by the permit, but in the event of the completion and maintainance of a wharf, that should be a permanent and beneficial improvement.

8. That the wharf mentioned in the proceedings in this cause was never completed, and is not such a permanent and beneficial improvement, as by the act of Assembly, will vest a title in fee in the land embraced in the Port Wardens' permit, in the maker of said wharf, and those who may claim under him.

9. That the defendants having caused the tract of land called *Gist's Inspection* to be located by metes and bounds, under a commission obtained by their ancestor for that purpose, are now estopped from extending the lines of said tract of land, so as to take in other land lying without the lines of said tract, at the time said commission was executed.

10. That the title to the land in dispute, out of the plaintiff, on which the defendants rely in their defence, is not such a title in the defendants or a stranger, as is sufficient to prevent the plaintiff from recovering.

The grant for *Gist's Inspection*, dated the 9th of July 1732, has no calls in it, but all the lines are course and distance. When the survey was made the courses ran into the water, and the grant was for land covered by water. The points arising in the *first* bill of exceptions are waived for the present. On the *second* bill of exceptions the material questions arise. It has been decided by this court that the title to lands covered by navigable water remains in the State. *Brown vs. Kennedy*, 5. *Harr. & Johns.* 195. Land so situated remains so until granted by the State. Has this land been granted by the State? We contend that it was not until it was granted to the lessor of the plaintiff. This tract lies without the lines of *Gist's Inspection;*

and *Gist's Inspection* must be located course and distance; and so located, it does not interfere with the land granted to the lessor of the plaintiff. There is no call to the river in the grant of *Gist's Inspection.* It cannot, therefore, bind on the river. Imperative calls are to be gratified, and course and distance disregarded. This is settled law. When the grant of a tract of land is by courses and distances only, the grantee cannot take alluvial formations. All such formations belong to the State, unless granted to another by the State. The proprietary abolished calls in all grants, in order to prevent more land being included in any grant than the party paid for and contracted to purchase. The evidence in this cause shows that there were no alluvial formations. *Harbaugh* had permission from the Port Wardens to make a wharf, which he commenced and worked some time on it, but finally abandoned it. The ancestor of the defendants then took possession, having before then leased the adjoining property to *Harbaugh.* By that lease he located his land; and where a location is made by a party, he is estopped from denying it. *Ridgely's Lessee vs. Ogle & Leonard*, 4 *Harr. & McHen.* 123. Upon *Harbaugh's* abandonment, the land reverted to the State, and *Hughes* had no right to interfere with the wharf. He was a trespasser upon the property of the state. *Act of Assem.* April, 1783, *ch.* 24, *sec.* 9. The acts of Assembly vesting powers in the Port Wardens to grant permission to erect wharves, contemplated permanent and beneficial improvements. The wharf commenced by *Harbaugh* and abandoned, was not a permanent or beneficial improvement. It was suffered to go to ruin. His contract, therefore, was void on his abandonment. Until such contract is fully complied with, the land continues in the State.

R. Johnson, for the appellees. The questions which arise upon the title and proof, are,

1. Whether or not the defendants are entitled, under the doctrine of alluvion, to all land added to *Gist's Inspection?*

2. Whether or not such a title is shown, under the permission given to *Harbaugh*, to erect a wharf, in the greater part of the land in question, as will prevent the plaintiff from recovering?

1. There can be no extension of the lines of *Gist's Inspection* farther than they will go by the courses and distances expressed in the grant. But the question of alluvion depends upon that tract of land lying on the river. It seems that a considerable part of *Gist's Inspection*, at the time of the grant, was covered by water. The claim under that grant, in the absence of the doctrine of alluvion, is for all that part which was so covered by water at the time of grant, but which is now, by the recession of the water, become firm land. The right of a person to alluvion, having land bounding on the sea, has been considered to be a common right. There is no difference whether the tract of land called for the river or not, the right to alluvion is the same. The right is given upon the principle, that he might lose land by the washing of the shore by the river. 2 *Blk. Com.* 61, 66, 261, 262. 5 *Bac. Ab. tit. Prerogative* (B) 495. This doctrine is not made to depend upon the grant of the land calling for, and binding on the river; but upon the fact only of the land lying adjoining the river. The point could never arise, if the land called for and to bind on the river,—for in such a case, wherever the river went, the land would go with it. But the right is given to the proprietor of the adjoining land, because his land does not, by its lines, call to bind on and with the water. It is, therefore, only necessary for the defendants to show, that their land did adjoin the river, at the time it was granted.

The doctrine of estoppel cannot operate in an action of ejectment as to the locations made of the same land in another action of ejectment, even if between the same parties. Here the plaintiff has not counterlocated the location made by the defendants of *Gist's Inspection*. The evidence is, that the water run in a particular manner, until it gradually receded to where it now runs from, O to B, to 5 to V, leaving land formed by accretion. This is admitted in the bill of exceptions, and does away the effect of *Harbaugh's* wharfing out a part of it.

If this gradual increase of the land was by the recession of the water, in conjunction with the acts of *Harbaugh*, still the doctrine of alluvion will attach. *Adams vs. Frothingham*, 3 *Mass. Rep.* 352. For a part of the land at least, there has been a gradual accretion, independent of the acts of *Harbaugh*.

2. The defendants are entitled, under the permit to *Harbaugh*, to build a wharf. But it has been said that *Hughes* was a trespasser. Suppose he was, it was nothing to the plaintiff. It was only necessary for the defendants to show that the State had parted with its title to the land. The Port Wardens had no authority to give permission to *Harbaugh*, to wharf out in front of *Hughes*'s land, so as to deprive him of his water right. The wharfing privilege was to be given to the owner of the land, in front of which the wharf was to be made. Act of 1745, *ch.* 9, *sec.* 10. The lease from *Hughes* to *Harbaugh* was only of a temporary interest. When is the improvement perfected so as to vest the property in the improver? There is nothing to show but that the wharf erected by *Harbaugh*, did answer all the purposes for which it was intended. It will not be said, that if the wharf had been completed, but is now in a ruinous state, it would divest the title out of the improver. There was an improvement made, even if the wharf was not completed. If the permission granted, was not complied with, it was the duty of the Port Wardens to have it destroyed, as a nuisance. Act of April, 1783, *ch.* 24. The presumption is, that the permit to build the wharf, was complied with. When *Hughes* took possession after *Harbaugh's* abandonment, the right became his. He was not bound to complete the wharf. All *Harbaugh's* rights were vested in *Hughes*. After the act of April, 1783, *ch.* 24, this kind of property and right were placed under the control of the Port Wardens, and the land office had no right to grant a warrant to affect any land so placed. All the right of the State, if it had any, was vested in the Port Wardens; and by the act of 1796, *ch.* 68, is vested in the corporation of *Baltimore*. Could not *Harbaugh* transfer his right to another; and could he not abandon in favour of *Hughes?* It will be presumed that he had regularly abandoned in favour of *Hughes*.

Mitchell, on the same side. When *Gist's Inspection* was surveyed and granted, as all the deeds offered in evidence recognize, the tract of land ran with the edge of the river. The common law doctrine of alluvion is the civil law of alluvion. *Harg. L. T.* 28. *Abbot of Ramsay's case*, 3 *Dyer*, 326. *b.* The State never had the right of alluvion. It is an increment of rivers subsequent to possession being taken by the sovereign. It cannot be appropriated or granted to any person, being imperceptible. If it was perceptible it might be granted, but being imperceptible it accrues to the adjacent soil. If an island appears in the sea, the sovereign may take possession of it. *The King vs. Lord Yarborough*, 10 *Serg. & Lowb.* 19. At what time did the right of the State, if any, accrue to this alluvion? The right of the public to navigable rivers, is no longer than any such river is covered by water. When it is no longer a public river, but has become land, it belongs to the owner of the adjacent soil, whether his grant for his land called to bind on the river or not. This case is not similar to *Brown vs. Kennedy*. This is a case of dereliction, not a filling up. *Harg. L. T.* 28. *Abbot of Ramsay's case*, 3 *Dyer*, 326. 2 *Blk. Com.* 261. 5 *Bac. Ab. tit. Prerogative* (*B.* 3,) 498. *The Batture case*, 5 *Hall's L. J.* arguments of *Jefferson* and *Livingstone*, 26, 27, 60, 63, 42, 46, 146, 147, 148, 149, 160, &c. *Smart vs. Dundee*, 8 *Bro. Parl. Cas.* 119. *Poth.* 19, 20. *Vattel*, *B.* 1 *ch.* 22, *sec.* 5, page 121. The right to the adjoining water passes as an appurtenance in all grants of land. This gave a right to the holders of adjoining lands to build wharves in *Baltimore*, if it did not obstrust the navigation of the river. The acts of 1745 and 1783, took away all the State's right and vested it in the Port Wardens; and they were the judges whether or not *Harbaugh* had complied with the permission granted to him to build a wharf. If *Hughes* was the riparian proprietor both before and after his lease to *Harbaugh*, the State had no right to divest him of such right. After *Harbaugh* abandoned, the rights of *Hughes* were reinstated, and he was clothed with all *Harbaugh's* rights, who could not acquire a fee simple right against *Hughes*. See 2 *Hall's L. J.* 434, and 4 *Hall's L. J.* 517.

The verdict in the former ejectment did not affect the question as to the land now in dispute. Here the defendants, and those under whom they claim, have had long and uninterrupted possession; and the presumption is that the water belonged to them. *Bealey vs. Shaw*, 6 *East.* 213.

Learned, in reply. The question is whether or not land formed by alluvion, vests in the proprietor of the adjoining land?

1. As to the effect of the grant of *Gist's Inspection*—it incorporates the terms and conditions under which the grantee held the land. Calls were excluded. *Kilty's Land Hold. Ass.* 228, 229. The condition of the grant was, that there should be no calls, but that each line was to run course and distance from the beginning. The grantee was then bound by course and distance location, and could not bind on, and run with the river. Lands here are not held as they are in *England*. There it is a prerogative right, but here all lands are passed by grant and held in fee. The whole province was originally granted to the Lord Proprietary. He granted to individuals, and what he did not grant, remained in him, and now in the State. Lands are not held here by fiction of law, but they are held under grants, which are differently construed from those in *England*. Our courts have said, that course and distance are to be the location, where there are no calls; but if there are calls, they are to be gratified, and course and distance not to be regarded. Is this so in *England?* Where the adjacent proprietor of the soil, by his grant, calls for and binds on the river, then he is entitled to all alluvion; but if his grant has no such call, he has no right to alluvion. *Vattel*, *B.* 1. *ch.* 22, page 121. 2 *Blk. Com.* 261, 262. *Brown vs. Kennedy*, 5 *Harr. & Johns.* 195.

2. Alluvion must be imperceptible, &c. and if not, the land formed otherwise belongs to the sovereign power, and does not vest in the riparian proprietor.

3. There was not such an improvement made by *Harbaugh* as the act of Assembly contemplated; and this court from the

evidence, is competent to judge of that fact, and apply the law to it. The evidence is that the wharf was not completed—only part of it was built, and then it was abandoned. There is no evidence that it was ever used as a wharf for any purpose.

STEPHEN, J. delivered the opinion of the court.

This action was instituted in *Baltimore* County Court, to recover a parcel of land called *Augustus's Discovery Resurveyed*, which was patented to *John James Giraud*, as vacant land, and whether it was vacant or not at the time he caused it to be resurveyed, is the question now to be determined, and in order to ascertain this question it becomes necessary to decide what was the true location of *Gist's Inspection*, patented to *Richard Gist*, on the 9th of July, in the year 1732, that is, not how it was originally located, but what was its true position at the time of *Augustus's Discovery*, and the resurvey upon *Augustus's Discovery* were taken up. It is admitted that *Gist's Inspection*, when it was surveyed and patented, ran into the water or basin of *Baltimore;* since that time the water has gradually receded, and the land formed by the recession of the water, is the land upon which *Giraud* made his survey of *Augustus's Discovery* in the year 1812, and his resurvey, in the year 1813. In the course of the trial, the parties made the following admission: "It is admitted that the several water lines or shores located by either party in this cause, shew and designate where the tide water of the *Patapsco* river or basin of *Baltimore*, flowed at different periods of time, receding gradually eastwardly, to where the same now are shewn by the most eastward location thereof, in blue shaded lines, and that the lines of *Gist's Inspection*, when the same was granted, including part of the sixth line thereof from the end of said line, ran into the water *Patapsco* or basin of *Baltimore Town*, to the end of the tenth line thereof, and that the above lines are so located, except a small part of the south end of the tenth line." It has been contended that as the lines of *Gist's Inspection* were originally run, course and distance, when the survey of it was made, and had no call to the water, it must be confined to its course and distance, and cannot be extended beyond them. This position is true as a general principle in exposition of grants; but the question is not here what was the true original location of *Gist's Inspection* at the time it was surveyed, but whether under the circumstances of this case, the defendants are entitled to the adjacent land formed by the waters having gradually receded in an eastern direction. *Christopher Hughes*, the father of the defendants, held a part of *Gist's Inspection*, and the deed under which he claimed title to it, describes it as running into the water; that deed bears date the 6th of June, 1782. The principle seems to be well settled, that where a tract of land lies adjacent or contiguous to a navigable river or water, any increase of soil formed by the waters gradually or imperceptibly receding, or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land. For this principle, see 2 *Blk. Com.* page 261, where he says, "as to land gained from the sea, either by alluvion by the washing up of sand and earth, so as in time, to make terra firma, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land *adjoining*." It is then not upon the principle that the land calls for the water, but because it adjoins the water, that the owner acquires a title to the soil so formed, for, continues he, *de minimis non curat lex;* and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore, a reciprocal consideration for such possible charge or loss; here we have in plain and strong language, the reason of the rule, which places the acquisition of the additional soil by the owner of the adjoining land, upon the ground, that he might be a loser by the breaking in of the sea, or at an expense to keep it out. And to bring the case within the operation of the rule, it is only necessary that the land should be adjoining the water. To the same effect is the law laid down in the 5th vol. of *Bacon's Abridgement*, page 494, *title prerogative;* the principle is there stated to be, that if the sea leaves any shore by a sudden falling off of the water, such derelict lands belong to the king, but if a man's lands *lying to the sea*, are increased by insensible degrees, they belong to the soil adjoining. Here, too, it appears only to be necessary, that the land should be adjoining to the sea, to entitle its owner to the derelict land formed by the recession of the water. It appears by the proof in the cause, that *Harbaugh* who obtained from the Port Wardens in *Baltimore*, a permission to make a wharf, never did complete it according to such permission, but after proceeding in the work for some time, totally abandoned it. This permission he obtained from the Board of Wardens who were authorised to grant it by the provisions of the act of 1783, *ch.* 24, but in order to vest a title in such wharf, it appears to be necessary that he should have completed it. This appears to be essential by the provisions of the act of 1745, *ch.* 9, *sec.* 10, by which it is enacted, that "all improvements, of what kind soever, either wharves, houses or other buildings, that have or shall be made out of the water, or where it usually flows, shall (as an encouragement to such improvers,) be forever deemed the right, title, and inheritance of such improvers, their heirs and assigns, forever." Neither *Hughes* nor *Harbaugh* therefore, acquired any title to the work done by *Harbaugh*, in virtue of his permission, but it being expressly admitted by the parties, that the water gradually receded to where it now flows, it is upon the ground of such gradual recession, by which the derelict land was formed, that *Hughes* and those now representing him claim title to it. The counsel for the appellant having waived the points arising on the first bill of exception, it is not deemed necessary to give any opinion upon it.

JUDGMENT AFFIRMED.

HOSKINS *vs.* RHODES.—*December*, 1829.

G, a *feme sole*, contracted with the plaintiff to let him sow a field in grain, and he agreed to give her one third of all the grain raised, as *rent*. The plaintiff went upon and sowed the field in rye. The defendant, who after the making the contract, intermarried with G, entered upon the field, refused the plaintiff permission to cut the crop, and afterwards cut it himself and carried it away. In an action of trover for the value of the rye, it was held that the contract between G and the plaintiff, clearly constituted them landlady and tenant; and that the plaintiff was entitled to recover.

The reservation of rent *eo nomine* necessarily constitutes a lease.

APPEAL from *Frederick* County Court. This was an action of trover, brought by the appellee (the plaintiff below) to recover the value of two hundred bushels of rye. The general issue was pleaded.

At the trial the plaintiff offered in evidence the following lease from *Violetta Gwinn* to *Samuel Wiles*, viz:

"Articles of agreement made, concluded, and agreed upon this the 4th day of March, 1820, between *Samuel Wiles*, of *Frederick* county, in the State of *Maryland* of the one part, and *Violetta Gwinn* of the other part of the said county and State as above mentioned, to wit: The said *Samuel Wiles*, for the consideration hereafter mentioned, hath agreed, and hereby covenants and agrees to build the following buildings, to wit: one dwelling house, one stable, one corn house and spring house, and to keep the fences in good repair. The said *Violetta Gwinn*, for the above consideration, rents to the said *Wiles* her part of a tract of land, formerly occupied by *Joseph Gwinn*, late of *Frederick* county, deceased, for which she insures him three years quiet and peaceable possession for the term of three years rent free, the first year to commence on the first of April, 1820. For and to the true and faithful performance of the foregoing covenants and agreements, the said parties do hereby bind themselves to each other and their respective heirs, executors and administrators in the sum of $600 dollars," &c.

The plaintiff then proved that sometime in the year 1822, he called upon *Violetta Gwinn*, she being a *feme sole*, and contracted with her to sow a field of ten acres of land, part of the farm leased to *Samuel Wiles*, in grain, and to give to *Violetta Gwinn* one third of all the grain raised upon said field as rent. That in pursuance of said contract the plaintiff went upon and sowed said field in rye—That in the month of July, 1823, the defendant, who had after the contract aforesaid, intermarried with *Violetta Gwinn*, entered upon said field and cut and carried away said crop. That the plaintiff had previously applied to the defendant, who had gone into the possession of the farm mentioned in the lease to *Samuel Wiles*, for permission to cut said crop, which the defendant refused, stating that he would cut the crop himself. The plaintiff further offered in evidence, that at the time of the contract aforesaid, *Violetta Gwinn* agreed that the plaintiff should hold said farm for three years after the expiration of the lease to *Samuel Wiles*. The defendant then proved that in the spring of 1823, the plaintiff and defendant agreed that that part of the lease which was to run from the 4th of March, 1823, should be abandoned, and that the defendant never went into possession of any other part of said farm, except the ten acre field aforesaid. The plaintiff then proved by *Samuel Wiles*, party to said lease, that in the fall of 1822, said *Wiles* agreed to let to the plaintiff the ten acre field aforesaid, to be sowed in grain, one third of which, raised upon said field, was to be delivered to the said *Wiles* in the shock. The plaintiff further proved by a witness, that he heard the defendant say that he would stand by his wife's contracts; and that the plaintiff might cut the grain growing upon the said ten acre field. The defendant then prayed the court to instruct the jury that upon the evidence offered, the plaintiff was not entitled to recover. Which instruction the court [T. BUCHANAN, A. J.] refused to give; but on the contrary thereof, gave their opinion to the jury that the plaintiff was entitled to recover. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN and ARCHER, J.

Nelson for the appellant, contended,

1. That the lease of the land to *Wiles*, being for a term certain, and to expire on a day certain, the landlord was entitled to the possession of the whole, on the 1st of April, 1823. That the crops growing on said farm, after that day, were the property of the landlord, no reservation having been made by the tenant, of a right to take away said crops, after the determination of the lease. That of consequence, the agreement between the tenant (*Wiles*) and the appellee, could avail nothing to the prejudice of the rights of the appellant. The tenant (*Wiles*) could transfer to the appellee, no other or greater interest, than he held himself, in the premises leased—2 *Blk. Com.* 145. 1 *Thomas Coke, Litt.* 633.

2. That by the agreement with Miss *Gwinn*, the appellee acquired no such exclusive interest in the growing crop, as to enable him to maintain the action. Because the letting of the ten acre field upon shares, *for a single crop*, was no lease of the land; and the possession, in point of law and fact, remained with the landlord. And with reference to said crop, the appellant and appellee, were tenants in common, having therein undivided interests. *Hare vs. Celley, Cro. Eliz.* 143. And because there was in proof, nothing to shew a destruction of the property, (which is indispensable, at the time of the suit brought,) which alone would enable one tenant in common, to maintain trover against his co-tenant. *Heath vs. Hubbard*, 4 *East.* 110, 121. *Wilbraham vs. Snow*, 2 *Saund.* 47, f. g. (*note* 1.) *Buller's N. P.* 34. 1 *Chitty's Plead.* 66. With regard to the three years lease, of which, there is proof of an agreement between the appellee and the wife of the appellant, it is only necessary to say, that it was *abandoned*, and that no possession of the property in question, passed to the appellee under it. The defendant does not contend, that under the circumstances disclosed, the appellee was not entitled to his portion of the crop, and that he might not have recovered the value thereof in a different form of action, or even in the action of trover could he have shown a destruction of the property. He insists, however, that of the crops in question, the appellant and appellee, were tenants

in common, and that the cutting and carrying it away, did not constitute such a conversion of the property, as to enable the appellee to maintain his action of trover.

Thomas, for the appellee, insisted that the parties were not tenants in common, under the contract as proved and set forth in defendant's bill of exception. *Buller's N. P.* 85, and the case there cited, *Welch vs. Hall. Weems vs. Stallings*, 2 *Harr. & Johns.* 365. If the plaintiff and defendant are to be considered as tenants in common of the grain in question; yet it is contended that the opinion of the court below, was right: because, there was an actual conversion and destruction in law, of the common property by the defendant, who seized the whole grain, claimed it as his own, and denied the title of the plaintiff. *Doe vs. Prosser*, 1 *Cowper's Reports*, 218. At all events, whether the acts of the defendant amounted to a destruction of the common property, is a question which the court below rightly should have left to the determination of the jury. *Barnardiston vs. Chapman and Smith*, *Bull. N. P.* 35.

The case relied on by the counsel for the appellant, *Hare vs. Celley*, *Croke Eliz.* 143, is not in point, and if parallel, is not law in this State.

1. Because, in that case, *Hare*, the tenant in fee, never *parted with possession*, of consequence the plaintiffs did not stand in relation of landlord and tenant. In this case, the appellee had *exclusive* possession by contract, with *Wiles*, with Miss *Gwinn*, and with the defendant himself. In that case *Hare* furnished a part of the seed grain, aided in manuring and sowing the land. In this case no such labour in common, and possession in common, existed between the plaintiff and defendant—Moreover the relation of landlord and tenant is *expressly* created by the contract, that one third of the grain should be delivered by the plaintiff, to Miss *Gwinn*, *as rent*.

2. The case from *Croke* is not law in this State, having been virtually overruled by the case of *Weems vs. Stallings*, 2 *Harr. & Johns.* 365. No reliance should be placed on the case of *Bradish vs. Schenck*, 8 *Johns. Rep.* 152—the only authority relied on there being the case already referred to in *Cro. Eliz.*

which is not applicable to this case, and is not sustained by reference to any known authority in the law.

MARTIN, J. delivered the opinion of the court.

The contract between Miss *Gwinn* and *Rhodes* for the ten acre field, clearly constituted them landlady and tenant. He was to make a crop, and give her one third of it *for rent.*

The case of *Hare* and others against *Celley*, reported in *Cro. Eliz.* 143, is very different from that presented by this record. In the reported case the contract was, that *Hare*, the owner of the soil, should find one half of the seed, and the other half to be supplied by the three persons who were to manure and cultivate the land, and the crop to be divided between them. The court said this being for only one crop, it was not a lease. In the case now to be decided, there is nothing for legal construction. The agreement is explicit, that one third of the crop should be paid *as rent*, and the reservation of rent *eo nomine*, necessarily constitutes a lease—*Rhodes* was the tenant of Miss *Gwinn* by express contract, and it is immaterial whether the rent was to be paid in money, or to depend on the amount of the profits of the land. 2 *Wheat's Selwyn*, 1017, *note* 2. *Bull. N. P.* 85.

JUDGMENT AFFIRMED WITH COSTS.

HAGTHORP *et ux. et al. vs.* HOOK'S Adm'rs D. B. N.—*December*, 1829.

In a cause which had been set down for hearing, the Chancellor, after argument of counsel, proceeded to discuss many rules and principles of equity, and a great variety of facts, as applicable to the subject under consideration; and announced his intention at some future day to decree accordingly. To enable him to do so, he referred the cause to the auditor, to state an account in conformity to his views, from the proceedings, and proofs then in the cause, or from such other proofs, as might be adduced by the parties, which they were respectively authorised to introduce upon notice, before a given day. In this state of the cause, an appeal was taken; and upon a motion to dismiss it, HELD, that the order in question did not so settle, or materially affect, all, or any of the rights, or interests in controversy, as to make it a decretal order, from which an appeal would lie;—that it was a mere preparative, to the decision of the cause, and not *decretal;* and that it was only from what the Chancellor had done, that is, adjudged, or decreed, and not from what he intends to do, that an appeal would lie.

A, by deed, conveyed certain real and personal chattels to I, upon the proviso, that if I, his executors, &c. should absolutely omit, neglect and refuse to pay certain creditors of A, recited in the deed, their just demands, then the deed should be void. This property came to the hands of I, and after his death, passed to his administrators and the other defendants claiming under him, and them. Upon a bill filed by the administrator *de bonis non* of A, praying that the property may be accounted for, and together with the rents and profits delivered up, it appeared that some part of the chattels real was still in the hands of I's representatives, some claimed by those who had purchased with a reference to the original conveyance, and the residue by those who offered no proof of being purchasers for value without notice. The Chancellor decreed that the deed would be considered a mortgage, and nothing having occurred to destroy its redeemable quality—but one of A's creditors having been paid, directed the auditor to state an account, in which I's representatives must be charged with the value of the whole of the personal chattels, and interest thereon, from the date of the deed from A to I; and with the rents and profits of the real chattels from the same date, and until the time when they passed into the hands of the other defendants; who were responsible during the time they respectively had possession. And that I's representatives would be held liable for all rents, and profits, which the other defendants should fail, or be unable to pay, giving them credit for the debt paid. PER BLAND, CHANCELLOR.

According to the law of England, an administrator *de bonis non*, cannot call the representatives of the previous deceased administrator of his intestate to account, for any property of the intestate that such predecessor may have converted or wasted; nor can he claim or recover any thing, but those goods, chattels and credits of his intestate which remain in specie, and are capable of being clearly and distinctly designated and distinguished as the property of the intestate. IB.

In equity, an executor or administrator, is considered as a trustee of the creditors, legatees and next of kin of the deceased; is expected and required to preserve the property of the deceased apart from his own; and if he does so, the court will do every thing that can be done to protect and assist him. IB.

The only remedy at present against an administrator or his representatives, for any waste or misapplication of the effects of the deceased, is by an action at law upon his administration bond, by any one interested. IB.

The authority conferred by letters of administration *de bonis non* by our law, is to administer all things described in the act of Assembly as assets, not converted into money, and not distributed, delivered, or retained by the former executor or administrator, under the direction of the Orphan's Court; and such an administrator can only sue for those goods, chattels and credits, which his letters authorise him to administer. Ib.

The legal title to the chattels real, and personal estate, of an intestate, vests in his administrator, who alone is considered as to them his legal representative; between the death, and the granting of letters, that title is suspended and vested in no one. Ib.

In the construction of the statute of distributions, it has been held, that although the creditors of the deceased are the first and special objects of its regard; yet that the next of kin, among whom the surplus is to be distributed take an interest which vests in them, by operation of law immediately, in the nature of a present debt of an unascertained amount payable at a future day; and it is clear that they can only obtain possession of their distributive share, through and from the administrator. Ib.

When the general replication is put in, and the parties proceed to a hearing, all the allegations of the answers which are responsive to the bill, shall be taken for true, unless they are disproved by two witnesses, or by one witness with pregnant circumstances. Ib.

Every allegation of the answer which is not directly responsive to the bill, but sets forth matter in avoidance, or in bar of the plaintiff's claim, is denied by the general replication, and must be fully proved or it will have no effect. Ib.

If a defendant submit to answer at all, he must answer fully, and particularly, not merely limiting his responses to the interrogatories of the bill; but respond to the whole and every substantial part of the plaintiff's case: he is not however bound to go further and to answer interrogatories asking a disclosure of matter, no way connected with, or material to the case. Ib.

When the answer in the body of it, purports to be an answer to the whole bill, but the respondent declares, that he is entirely ignorant of the matters contained in the bill, and leaves the plaintiff to make out the best case he can, or uses language to that effect; and the plaintiff files the general replication, all the allegations of the bill are thus denied, and put in issue; and consequently all of them must be proved at the hearing. Ib.

The rule in relation to trusts by implication, or operation of law, is by no means so large, as to extend to every mere voluntary conveyance. Ib.

Where the nature of the transaction charged in the bill, is such a one as must have been altogether within the knowledge of the intestate, the administrator may answer as he is informed and verily believes, but the answer of an administrator must always be taken, as well with a reference to the reason given for his belief, as to the nature of the subject of which he speaks. Ib.

A purchaser for a valuable consideration without notice will not be disturbed in equity. Ib.

A purchaser with a knowledge of the trust becomes himself the trustee, and stands in the place of the vendor, under whom he claims. Ib.

A purchaser with notice, from another purchaser without notice, may protect himself by the want of notice in his vendor.

When a purchaser cannot make title, but by a deed which leads him to a knowledge of the fact; and more especially, when the deed by virtue of which he takes, recites, or directly refers to the instrument, in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a purchaser with notice. Ib.

Under the head of just allowances, it has long been the course of this court, to allow a trustee or mortgager in possession, for all necessary expenses incurred for the defence, relief, protection and repairs of the estate. And when a mortgager thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he should be allowed the value of them. Ib.

The estimate of the value of such lasting improvements, is to be taken as they are, at the time of accounting, or passing the final decree; and in charging rents and profits the estimate must not include those arising exclusively from such improvements. Ib.

This was an appeal from Chancery. The bill was filed by *James Neale*, administrator *de bonis non* of *Anthony Hook*, and claimed payment for certain personal, and an account of the rents and profits of certain leasehold property, which the said *Anthony* in his life time had conveyed in trust to *John Hook*, deceased, and which was alleged to be in the possession of the representatives of *John Hook*, viz. *Edward Hagthorp and wife*, and other defendants, purchasers from the said *John* or his representatives. The complainant claimed the property for the purpose of distributing it according to law, and charged the defendants with confederating to prevent that object. Answers were filed, testimony taken, and the cause set down for hearing. But as the merits of the case were not reviewed by the appellate court, the appeal having been dismissed as prematurely taken, on the motion of the appellees; it is deemed unnecessary to publish more than this brief notice of the proceedings, and to refer to the opinion of the chancellor which follows for the material facts of the cause, and to which his opinion is applied.

Bland, Chancellor, December Term, 1826.

This case standing ready for hearing, and the counsel on both sides having been fully heard, the proceedings were read and considered.

This suit is brought by *James Neale*, alone, as administrator *de bonis non* of the late *Anthony Hook:* and, from the pleadings and proofs, it appears, that the intestate, *Anthony Hook*, died in June, 1798: that in the month following, administration on his goods, chattels and credits, was granted to his son, *John Hook*, who died in September, 1800: that in the month of November following, administration *de bonis non* of the personal estate of the late *Anthony*, was committed to his widow, *Mary Hook;* who died sometime after the year 1804: and, that on the 5th of April, 1820, administration *de bonis non* of all the goods, chattels and credits of the late *Anthony*, was granted to *James Neale;* who, as such, on the 15th of December following, instituted this suit.

According to the law of *England*, an administrator, *de bonis non*, cannot call the representatives of the previous deceased administrator of his intestate to account, for any property of the intestate, that such predecessor may have converted or wasted; nor can he claim or recover any thing but those goods, chattels, and credits of his intestate, which remain in specie, and are capable of being clearly and distinctly designated and distinguished as the property of his intestate. 3 *Bac. Abr.* 19, 20. Hence, it is, that, in a Court of Equity particularly, an executor or administrator, who is there considered as a trustee for the creditors, legatees, and next of kin of the deceased, is expected and required to preserve the property of the deceased apart from his own, and by itself to give it, as is said, an ear mark, that it may be always known and readily traced to any one, into whose hands it may happen to fall: and if he does so the court will do every thing that can be done to protect and assist him. 3 *Mer.* 42, *Salk.* 306.

According to our provincial testimentary system, an administrator *de bonis non* might, under certain circumstances, have had his predecessor cited before the commissary and compelled to account. 1715, *ch.* 39, *sec.* 3. *Dep. Com. Guide*, 55, 57. But at present, the only remedy against an administrator or his representatives, for any waste, or misapplication of the effects of the deceased, is, by an action at law upon his administration bond by any one interested. For, it is expressly declared by our present law, that the authority conferred, by letters of administration *de bonis non*, shall be to administer all things described in the act as assets, *not converted into money, and not distributed or delivered, or retained by the former executor or administrator, under the direction of the Orphan's Court*, 1798, *No.* 101, *ch.* 14, *sec.* 2.

Hence, it follows, that this plaintiff is incompetent to demand, in the representative character, in which he sues, any thing, but those goods, chattels and credits, which his letters authorise him to administer; that is, the chattels real and personal property of his intestate, which remain undisposed of by either of the previous administrators, *John* or *Mary;* or which have been, and continue to be held unaccounted for by any one, as trustee or agent of the late *Anthony Hook*, his intestate. The statements and allegations of these very obscure original and amended bills, must, therefore, be taken subject to the limited rights of the representative character of this plaintiff.

It appears, from the pleadings, in this cause, that some of the next of kin, and distributees of the late *Anthony Hook*, under an impression, that the chattels real of the deceased, had vested absolutely in them, have disposed of, or attempted to make a final disposition of the whole, as if such chattels had been immediately cast into their hands by the mere operation of law: in like manner as the real estate of an intestate, is at once cast upon his heirs. If these next of kin acquired, at once, by the act of the law alone, a legal right to these chattels real, by virtue of which they might, either concurrently or independently of the administrator, dispose of them, then, as the joint or independent holders of the property in controversy, they ought to be made parties to this bill; and if they have acquired such a legal right, and have actually disposed of these chattels, then, it is no less evident, that all claim against these defendants is, so far, entirely at an end. In these points of view the allegations of the bill, in relation to these next of kin, of the intestate, present some important preliminary enquiries.

The real estate of an intestate, devolves at once and entirely, upon his heirs, by the mere act of the law itself. But his personal property is, by the law itself, cast upon no one; nor does the legal ownership of it vest, immediately, in any person. Because, such legal title can only vest in an administrator; who alone, is considered as the legal representative of the intestate, as to his chattels real, and personal estate. In the interval of time, between the death of the intestate and the granting of administration, the legal right to such personal property is in suspense, or in the keeping of the law, and vested in no one. During that interval, there is no person who can sue or be sued for it; and, hence, it has been held, that a person who had, after the death of the intestate, obtained possession of his personal property, could not have it quieted or matured into a right, by the lapse of any length of time, even as much as forty years uninterrupted possession, before the granting of letters of administration; because, the statute of limitations could not be allowed to operate at all, until the legal title was vested in some one; and there was a person lawfully clothed, with a capacity to sue for, hold and dispose of such property, 4 *Bac. Abr.* 479, *Salk.* 421.

Our statute of distributions, like that of England, 3 *Bac. Abr.* 72, directs the goods, chattels and credits of those, who die intestate, to be committed to an administrator, whose powers and duties are prescribed. He has a vested interest in the personal estate of the deceased, 1 *P. Will.* 43: and is directed to collect and take the whole of it into his possession, which, or the proceeds of the sales thereof, he is, in the first place, to apply to the satisfaction of all the debts due from the intestate, and then, but not until then, he is to distribute the *surplus* among the next of kin of the deceased. In the construction of this statute, it has been held, that although the creditors of the deceased are the first and special objects of its regard; yet, that the next of kin, among whom the *surplus* is to be distributed, take an interest which vests in them, by operation of law immediately. It is considered as a species of *chose in action* of an indefinite value: in nature of a present debt, of an unascertained amount payable at a future day, 3 *Mod.* 59. 1 *Show.* 2, 25. 2 *Show.* 407. *Pre. Cha.* 21. 1 *P. Will.* 380. 4 *Ves.* 665. This interest vests in those who are the next of kin of the deceased at the time of his death: not, however, in exclusion of a posthumous child, who is regarded as a then living though unborn distributee, and therefore, should any of them die before the distribution of the *surplus* is actually made, his share will not be sunk into the estate of the intestate: but go to his own legal representatives in like manner as his other personal property, *Dep. Com. G.* 114. 2 *P. Will.* 446.

Hence, it is clear, that in no case, nor under any circumstances, can any one as next of kin of the intestate, rightfully and legally make title to, or obtain possession of his distributive share, but through and from the administrator: who, in equity, is regarded as a trustee for creditors and the next of kin; and as such may, in Chancery, be called to account by all or any of them, 1 *H. & I.* 151. 5 *Ves.* 743. And every one who takes possession of personal property of an intestate, after his decease, may be sued at law by a creditor as an executor *de son tort*, and charged accordingly; and in equity, he will be considered as a trustee, and held accountable to the administrator, no matter how long he may have had possession, before the administration was granted. 2 *Rand. Rep.* 397. 2 *Desan.* 232. The utility and necessity of having all the personal estate of a deceased, placed in the hands of an administrator, and the principle of law that neither a creditor, nor a distributee of an intestate could obtain any right to the personal estate of the deceased in any other manner, than from an administrator, has been very strongly recognized by the legislature more than a century past.

By the act of 1719, *ch.* 14, *sec.* 7, it is declared, that many widows, or others having the deceased's effects in their hands, *and right to the administration thereof*, designedly suffer other persons to administer, whose mouths are easily stopped, with part of the estate's being delivered to them, and bring only such part of the appraisement to the great dishonour of the deceased, and deceit of the living; for prevention whereof, as well as of frequent tedious suits, for the detecting such concealments, it is enacted, that the court may, in a summary way, cite such persons before it, and examine, and decide on the matter. Here the distributees, the widow and others, having a right to the administration, who are the next of kin, are specially designated, and it is expressly declared, that they shall not retain, or hold any of the personal estate of the deceased: and if they do conceal any of it, they are made liable in a summary way as wrong doers.

If the law were otherwise; and if each creditor, and every one next of kin, were allowed to help himself, to what he thought his due; to seize upon, and, in any manner by his own act alone, acquire a legal right to the personal property of the intestate; the greatest confusion would ensue, and the most monstrous frauds might be perpetrated; no letters of administration would be taken out, in any case; but on the death of every one who had left any personal estate, worth contending for, a disorderly scramble would take place; and those residents at a distance, infants, and all others who were unable to take care of their own interests, would be openly and wantonly defrauded, as this venerable act declares, "to the great dishonour of the dead and deceit of the living." Such a course could not be tolerated in any shape or for an instant.

Hence, the indispensable necessity in all cases of a regular administration, and of compelling all, as well creditors, as next of kin, to resort for the payment of their claims and distributive portions, to an administrator. In this case, it is not pretended, that these next of kin of *Anthony Hook*, obtained any thing, any right whatever from his administrators; consequently, having derived no right from either of the administrators; and none having been cast upon them by mere operation of law: they never had the power, in any manner, legally to dispose of any of the personal estate of the deceased; or to do any act which could at all affect the rights of the present plaintiff.

Leave was asked and obtained on the 7th of February, 1823, to make *James Hook*, the son of the late *John Hook*, a defendant; who, on the same day, filed his answer to the amended bill; and in a kind of amended or duplicate bill, filed on the 23d of July, 1824, *James Hook*, is once incidentally spoken of as a defendant; no process was ever prayed against him; but by an agreement, filed on the 4th of November, 1826, he is admitted to be a party defendant. This person is no otherwise noticed in the proceedings; no charge, whatever, has been made against him; nor does it appear that he can, in any degree, be made liable for any part of the subject in controversy; either in his individual capacity, or as heir, or next of kin of his father, the late *John Hook*, or of his grandfather the late *Anthony Hook*. The presence of this defendant, *James Hook*, it appears to be in no way necessary; and, therefore, I shall, for the present, take no further notice of him.

The bills, through a considerable portion of them, seem to consider the next of kin and distributees: or, as it calls them, in relation to these chattels, *the heirs of* the late *Anthony Hook*, to be in some way or other parties to this suit: but they have neither been made plaintiffs, nor defendants as such; and therefore, all that has been said, or proved about them, and their agreements, must be rejected as mere surplusage, and entirely foreign to the matter now under consideration. *William McMechen*, a defendant, says, he answers "the bill of complaint of *James Neale* and others, representatives of *Anthony Hook*, deceased:" and in the body of his answer, he says, "during all which time several of the complainants resided in the neighbourhood of the said land:" others of the answers seem to have an eye to some other complainants, besides *Neale*. These respondents appear, in this respect, to have turned their attention to some of the irrelevant circumstances related in the bill, without sufficiently regarding its substance. But all such expressions and allusions, in the answers, must, in like manner, be rejected as surplusage.

So much as to the excrescences, the foreign matter, and mere careless verbiage of the bill, and some of the answers. But, before we can proceed to consider the merits of the case, it will be necessary to ascertain from these pleadings, as accurately as practicable, what is the matter as to which the parties are at *issue;* and what part of the allegations of each had been admitted, taken for true, or is to be sustained or combatted by proof. In relation to these matters it will be necessary to explain, recollect, and apply some of the general rules in relation to answers.

The *first* of these general rules, which have a bearing upon this case is, that where the general replication is put in, and the parties proceed to a hearing, all the allegations of the answers, which are responsive to the bill, shall be taken for true; unless they are disproved by two witnesses, or by one witness, with pregnant circumstances. The answer to this extent is considered as evidence, and conclusive, unless disproved; even although the defendant may have a direct and palpable interest in establishing the truth of what he advances. 3 *Wheat.* 527. An answer is only so far responsive as it answers to a material statement, or charge in the bill, as to which, a disclosure is sought; and which is the subject of parol proof; but no further. Where a deed, or instrument of writing is necessary to establish any right, and the bill enquires for the evidence of such right, the answer, unaccompanied and unsupported by such deed or writing, will be no evidence, although it should directly respond to the bill; because the answer is only in the nature of parol evidence; and in such case, evidence of a higher grade is required by law. 5 *Harr. & Johns.* 381.

But where the bill asks for the production of evidence, which from the nature of the plaintiff's case, he has a right to claim, that may be necessary and useful to him in other cases beside the one then under consideration; an answer to such a bill is not responsive, which merely asserts the facts without saying any thing of the evidence of its existence, or the means of obtaining it. And, where a defendant, by his answer, asserts a right affirmatively in opposition to the plaintiff's demand, he must establish it by proof; or the assertion will be disregarded: for, a defendant cannot be permitted to swear himself into a title to the plaintiff's estate. 1 *Wash.* 225. 1 *Mun.* 395. 2 *John, C. Rep.* 87. 2 *Ev. Poth.* 157. But where an administrator is called upon to answer certain matters, which appear to have rested exclusively within the knowledge of his intestate, it will be sufficient that he swears as he is informed and believes; *Carnan, Ex'rs vs. Vansant's administrators*, 1807, *M. S.*, but such an answer is to be taken with reference to the reasons given for his belief; for, if the reasons are futile, and especially if the alleged belief be in a high degree irreconcileable with the admitted, or established circumstances of the case, the answer cannot be credited: nor be allowed thus loosely to swear away the equity of the bill. *Tong. vs. Oliver and others*, 1809, *M. S.* 9 *Can.* 160.

A *second* general rule is, that every allegation of the answer, which is not directly responsive to the bill, but sets forth matter in avoidance, or in bar of the plaintiff's claim, is denied by the general republication, and must be fully proved, or it will have no effect.

A *third* general rule is, that, if the defendant submits to answer at all, he must answer fully, and particularly: not merely limiting his responses to the interrogatories of the bill: but respond to the whole and every substantial part of the plaintiff's case. 1 *John, C. Rep.* 75, 107. He is not however, bound to go further, and to answer any interrogatory asking a disclosure of matter no way connected with, or material to the case. If the answer be in any respect evasive, or insufficient, the plaintiff may except to it; and thus extract from his opponent a full and perfect answer. But to this general rule there is a modification, the nature and bearing of which may be sufficiently illustrated by one or two instances: a defendant to a bill of discovery, answered a portion of it, and as to all the other matters therein set forth, he answered and said, that he had no other knowledge of them, than what he had obtained confidentially as counsel; and therefore declined answering further: this answer was deemed sufficient; and again a defendant answered as to part, and as to the residue relied upon the statute of limitations: this answer was also held to be sufficient. In such cases, a part of the answer performs the office of a plea; and the defendant thus makes defence to the whole case, by a disclosure of all the facts so far as he is bound *so to respond;* and for the residue, by presenting such an equitable bar to the plaintiff's claim, as is a sufficient excuse for not answering *in the manner required by the bill.* The exact compass of this *modification* of the rule, that if a defendant submits to answer at all, he must answer fully, remains yet to be adjusted. 2 *Mad. Ch.* 339. Much has been said upon the subject; but as the cases in relation to this "distracted point," as it has been called, have no bearing upon the case now under consideration, they have been thus generally noticed merely to prevent misapprehension.

A *fourth* general rule, is one which grows out of the *third* rule, that exacts a full answer: and requires to be attentively considered in this case: it is, that where the defendant fails to answer any of the material allegations of the bill, such unanswered allegations shall, at the hearing, be taken to be true. (*a*) Thus were the bill demands the delivery of two pieces of property, and the answer makes defence as to one, but is totally silent as to the other. In such case according to this rule, the bill may be taken *pro confesso* for that, as to which the answer is silent; and the plaintiff may obtain a decree accordingly. The propriety of this rule has, however, been questioned; and therefore it stands in need of all the support it can derive from authority, reason, and analogy.

If, upon exceptions, the answer is held to be insufficient, the defendant will be ordered to answer more fully: and if he fails to do so, in England, sequestration will go against his estate. The plaintiff need not, however, stop there, but may proceed to have his whole bill taken *pro confesso;* for the court is in the habit of considering an insufficient answer as no answer. 2 *Atk.* 21. 3 *Ves.* 209. 1 *V. and B.* 367. 2 *Ves. and B.* 258. In this state, obedience to the order directing a more perfect answer, upon exceptions being sustained, is usually enforced by attachment; but, as in England, on the defendant's failing to answer as ordered; and the process of attachment failing to coerce an answer, as required, the whole bill may be taken *pro confesso.* 3 *Ves.* 372 209; so, where the defendant had answered, and the

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(*a*) The fourth general rule above stated has been denied by the appellate court in the late case of *Warfield vs. Cambrill.*

plaintiff then amended his bill, introducing new matter, he is entitled to an answer to such new matter; because, an amended bill is a part of the original bill, and the defendant's answer thereto is a part of his original answer; and consequently, the defendant is as much bound to answer the amended bill, as to answer each portion of the original bill itself. Therefore, if he fails to do so, the plaintiff may proceed, according to the course of the court, and have his whole bill taken *pro confesso.* 4 *Ves.* 619. 3 *John. C. Rep.* 410. For, as it has been said, if the plaintiff should not be entitled to such a decree under those circumstances, then the authority of this court would be very defective and the justice of it might be eluded. 2 *Eq. Ca. Ab.* 179. 1 *Har. Pr. Ch.* 277. 2 *Atk.* 21.

A plea is a special answer to a bill, differing in this from an answer in common form, as it demands the judgment of the court, in the first instance, whether the special matter urged by it, does not debar the plaintiff from his title to that answer, which the bill requires: but where, from the matter set forth in the bill, an answer is required to support a plea, it will be overruled without such an answer; upon the ground, *that the matters not thus answered are taken for true.* As where the bill sets out a claim arising on a mortgage made more than twenty years before the institution of the suit, and then goes on to shew, that there have been such partial payments, or recent acknowledgments, as would take the case out of the statute of limitations, were it pleaded. In such case, a plea of the statute of limitations must be supported by an answer, denying such partial payments and recent acknowledgments; for, otherwise, those circumstances, not being denied by the plea, would be taken for true, if not denied by way of answer; and would show, that the case had been taken out of the statute. 2 *Scho. & Lef.* 725.

These authorities appear satisfactorily to sustain this rule; and to shew, that the defendant cannot be allowed, with impunity or advantage to himself, to refuse to answer at all; or, in any manner or form, to stop short, or to omit to answer any material part of the plaintiff's case: and, that the consequence of such a refusal or failure, is, that the whole bill, or so much of it as remains unanswered, may, at the hearing, be taken *pro confesso.*

The proceedings in Chancery have been formed according to the course of the civil law, in some respects; and analogous to the common law in others; and, as to all matters of substance, there must be the same strictness in pleading in equity, as in law. *Mit. Pr.* 232. Hence, it is not unfrequent, where a case arises, as to which former decisions furnish no safe guide, to have recourse to the illustrative analogies of the common law. 2 *Atk.* 21. 3 *Atk.* 589. 6 *Ves.* 594. 9 *Ves.* 55. 11 *Ves.* 292. Supposing, then, that in relation to this subject, there was a total absence of all manner of precedent and authority, the analogous course of the common law will be found to afford much and strong light.

At common law, there are two defaults; the one before, and the other after appearance. The consequence of the first, in England, is, that the defendant may be outlawed; and in this State, in many cases, is, that an attachment may go against his estate. The consequence of the second default, or the defendant not putting in any plea at all, is, that the plaintiff may have a judgment by *nil dicit.* The plea is called, at common law, the answer of the defendant: and, if he fails to answer, judgment is awarded against him on the ground, that he has thus tacitly admitted, or confessed the case of the plaintiff, and left him nothing to litigate or to prove. So, in equity, after an appearance, the taking a bill *pro confesso*, where no answer has been put in, or no sufficient answer, after exceptions have been sustained, is analogous to the taking the declaration for true, where the defendant has put in no plea at all, or it has been held insufficient on demurrer. 2 *Atk.* 21.

It is a rule at common law, that every plea must answer the whole declaration, or at least every material part of it, which goes to constitute the gist of the action. But, the defendant may fail, or purposely decline to plead, or answer to every part of the declaration: in which case the plaintiff may join issue on the plea, and take his judgment for the unanswered part as by *nil dicit.* And we are told, that it is frequently judicious to plead only to part, or to admit a part of the cause of action in order to save the costs of the trial of such matter: for, nothing can be tried, that is not put in issue; and the defendant, by declining to answer a part, deprives the plaintiff of the power to burthen him with the costs and expense of proving that, on a trial, which he has not denied, and put in issue. 1 *Chit. Plead.* 509. So, in equity, where the defendant fails, or declines answering any material part of the plaintiff's bill, as to which he seeks, and may obtain relief, it amounts to a tacit admission of so much: and, such part of the bill may, therefore, be taken *pro confesso:* and, if the declining to answer a part of the cause of action may, from any motives, be judicious at common law, certainly a defendant in Chancery may be induced for like reasons to pursue a similar course; since no costs, or expense, can be allowed in Chancery, any more than at law, for the proof and trial of any matter not put in issue. 2 *P. Will.* 557. 19 *Johns. Rep.* 505. 2 *Desan.* 172. Upon the whole, this rule in relation to pleadings in equity, appears to be as fully sustained by analogy to the course of the common law, as by direct and positive authority.

There is, in many instances, a strong disposition manifested by courts of Chancery to harmonise their proceedings, in principle, with the positive rules of the common law. But, where the Legislature have prescribed rules of proceeding for the court itself; and cases occur within the *spirit*, but not within the *letter* of them, the Chancellor feels himself, not merely invited, for the preservation of harmony, but becomes sensible of a duty to conform, upon the ground, that equity is bound to follow the law in *spirit* and in *principle.*

In equity, the consequences of a default before appearance, when pursued to the utmost, seldom enabled the plaintiff to obtain the precise relief he was in quest of; because, there could be no adjudication upon his case, applying the remedy, as specific performance, or the like, exactly to suit it, until the defendant had appeared, and the allegations of the bill had been taken for true or established. The English courts, evidently under a strong sense of the necessity of their being some better mode of attaining justice, than by a sequestration of the defendant's estate, have carried the doctrine, in relation to substituted and constructive summons, full as far as was within the compass of judicial power; further than it ever was in this State; and yet, short of the point of manifest and general utility. In the year 1718, the Legislature partially interposed, and by the act of 5 *Geo.* 2, *ch.* 25, provided the means of enabling a plaintiff to proceed against a defendant, who had not entered his appearance, and have his bill taken *pro confesso;* which could not be done in equity until then. 2 *Atk.* 23. This statute was introduced and used in this state, *Kil. Rep.* 189, and seems to have been the original settler among us; whence sprang that numerous family of legislative enactments upon this subject, to be found in our statute book, from the year 1773 down to the present time.

The following is a list of the acts of Assembly under which a bill may be taken *pro confesso* against a defendant, who has not been summoned nor has appeared: 1773, *ch.* 7, *sec.* 3. 1785, *ch.* 72, *sec.* 30, 31. 1787, *ch.* 30, *sec.* 1. 1790, *ch.* 38, *sec.* 3. 1792, *ch.* 41, *sec.* 2, 4. 1794, *ch.* 60, *sec.* 2, 3, 5, 9. 1795, *ch.* 88, *sec.* 1, 2. 1797, *ch.* 114, *sec.* 2, 3. 1799, *ch.* 79, *sec.* 3, 4. 1804, *ch.* 107, *sec.* 2. 1820, *ch.* 161. These acts provide for all the cases that have, or, as it is supposed, can occur; absent or absconding defendants; non-resident defendants, who are either *non compos*, infants, or adult; absent or non-resident mortgagers; defendants who evade the service of the *subpœna;* the case where there are two or more defendants, of one or some of them being non-residents; the case of a bill of revivor, where the party had removed out of the State, &c. And where a party had been returned summoned, but had failed or refused to appear and answer, the acts of 1785, *ch.* 72, *sec.* 1, 9. 1799, *ch.* 79, *sec.* 1, 2. 1820, *ch.* 161, provided that the plaintiff may, according to a prescribed mode, have his bill taken *pro confesso.*

According to the course of the English court, there are cases in which an implied confession is held to be a sufficient ground for a decree: as where the defendant appears, and has been attached for not answering, and is brought three times from prison into court, and has the bill read to him, and refuses to answer; such public refusal in court amounts to a confession of the whole bill. So too, where a person appears and departs without answering, after which process has gone against him to sequestration, there also the bill is taken *pro confesso;* because, it is presumed to be true when he has appeared and departs in despite of the court, and withstands all its process without answering. *For. Rom.* 36. But, these modes of having a bill taken *pro confesso*, having been deemed in many respects too oppressive, or unnecessarily tedious, 1 *John. C. Rep.* 8, more easy and expeditious modes have been provided by the acts of 1785, *ch.* 72, *sec.* 20. 1779, *ch.* 79, *sec.* 2, 9; and 1820, *ch.* 161, *sec.* 1. By these acts, if a defendant, who has appeared, fails to demur, plead, or answer, according to the rules of court, within a limited time, the bill may be taken *pro confesso.*

At law, where the nature and amount of the plaintiff's demand may be distinctly ascertained from the declaration, as in debt assumpsit, upon a promissory note, or the like, the judgment by *nil dicit*, is final; but in actions for the recovery of damages only, it is not so; because the amount claimed is uncertain; and, therefore, an enquiry must be made, and proof heard as to the quantum which the plaintiff is entitled to recover. Suits in equity are susceptible, in some degree, of a similar classification; and, hence it is, that several of our acts of Assembly, which allow the bill to be taken *pro confesso*, go on to declare that the Chancellor may, *in his discretion*, order a commission to issue for the plaintiff to examine witnesses to prove the allegations of his bill; or the plaintiff may himself be examined on oath. But in some of these acts such a provision was omitted; and hence, by the act of 1799, *ch.* 79, *sec.* 5, it is said to appear unreasonable, that, in any case whatever, the Chancellor should be directed absolutely to take the bill or bare allegations of a suitor *pro confesso;* and, therefore, enacts that, in all such cases, it shall be at the *discretion* of the Chancellor, either to take the bill *pro con-*

fesso, or to direct a commission for taking depositions *exparte:* which law, as amended by the act of 1818, *ch.* 193, *sec.* 6, 5, has enabled the Chancellor to call for proofs and explanations in all cases which appear to require it.

These, then, are the legislative rules in regard to the *whole bill*, where no answer at all is put in. But not one of these acts of Assembly which seem to have provided, with such an infinite deal of care and solicitude, for all the various causes and modes of neglecting or failing to answer the *whole bill*, do, in any manner, speak of, or allude to the case of a neglect or refusal to answer a distinct or material *part* only of the bill: where an answer is made to all the rest. The act of 1795, *ch.* 88, *sec.* 1, says, the bill may be taken *pro confesso*, and the Chancellor shall proceed to decree in the same manner, as if the defendant had admitted by his answer the facts stated in the bill; and in case the defendant has been summoned, or has appeared, and fails to answer, he must be ordered to do so, by an appointed day; or an interlocutory decree may be entered on the default, and a commission issued *exparte:* but, in every case the consequence of the default is, that the bill may be taken *pro confesso.*

Hence it appears to be clear, that these legislative rules which, according to their *letter*, are only applicable to the case where there is no answer at all, must, in *spirit and principle*, be alike applicable to the case where the answer only covers a *part* of the material allegations, and is totally and absolutely silent as to the residue of the bill; and, consequently, according to the principle and spirit of these legislative rules, the unanswered part of the bill must, on the hearing, be taken to be true; otherwise, there would be a manifest inconsistency in the course of the court: and although a party might have a right to relief in Chancery, and be entitled to an answer to every allegation in his bill, necessary to sustain his claim to relief: if the defendant failed or refused, to answer them all, he might have his bill taken *pro confesso*; yet, if he failed or refused to answer a part of those allegations for such part unanswered, he must pursue a different course. But the reason and principle being the same, the rule must be the same in both cases. If the *whole bill* is left unanswered, it may be taken for true: and, if a *part* only be left unanswered, that *part* must, in like manner, be taken for true.

These acts of Assembly of ours, allowing a bill to be taken *pro confesso* on the defendants default in not answering all of them, authorise the Chancellor in such case to pass a final decree at once, if he deems it unnecessary to issue a commission. The decree by default, in all such cases, is as completely final and absolute, as a judgment by default in an action of debt at common law. The course of the English court of Chancery is, in some respects, different. There, when the plaintiff obtains a decree by default, a provisional clause is superadded, that such decree is to be binding on the defendant, unless being served with process, he shall, within a limited time, shew cause to the contrary. And this decree, being *sub modo* only, is emphatically a decree *nisi;* which cannot be, nor ever is considered as final, until the party has been served with process, and it has been made absolute by the court itself, 1 *Harr. Pr. Ch.* 625. *Redes, Tr.* 195.

This, it seems, has long been the established practice of the courts of Chancery of *Virginia;* so, that where a defendant has not answered the bill, it is held to be error to enter a final decree against him, taking the bill *pro confesso*, without the previous service of a decree *nisi*: 3 *Mun.* 83. 2 *Hen. & Mun.* 19. And it has also been held in that State, that, were some of the allegations of the bill were not answered, the plaintiff might either except to the answer as insufficient, or move to have the unanswered part of the bill taken *pro confesso.* But, if he does neither, it must be proved, that he shall not, on the trial, avail himself of any implied admission by the defendant: for, where the defendant does not answer at all, the plaintiff cannot take his bill for confessed, without an order of court to that effect, and having it served on the defendant; and this is the only evidence of his admission: of course, if this mode of proceeding as to the confession of the whole bill be correct, it must be equally correct, as to the confession of any part; 2 *Hen.* and *Mun.* 17, 19. 2 *Mun. R.* 298-86. 4 *Rand. R.* 454. 6 *Cran.* 51.

Such is the rule, of the Chancery courts of *Virginia.* The default, in not making any answer at all; and that of not answering all the allegations of the bill, are precisely alike in kind, differing only in degree: hence, the courts of that State, have applied the same rule, in spirit and principle, to both defaults. The party is allowed to pursue the same course to have his bill, either *wholly* or *partially* taken *pro confesso*, according to the extent of the defendant's default. In this State no decree, *nisi*, is ever entered and served on a defendant who has not answered: but an absolute decree may be entered at once, as soon as he can be fixed with the default; which can be at any time after the limited period for answering has elapsed, or when he has elected to make, and has actually filed his answer to the bill. The principle and reason of the rule, in *Virginia* and in *Maryland*, are the same in relation to a partial answer. The courts in each State, follow the spirit of the established, or legistative rule, which directs the mode of proceeding, in case the defendant puts in no answer at all.

The plaintiff is entitled to an answer to each allegation of his bill, which he may require; either because he cannot prove the facts, or to aid his proof, or to avoid expense: and if the plaintiff conceives the answer to be insufficient to the charges in the bill, he may except to it; which has been compared to a demurrer at law, for want of form. The sole object of exceptions is, to extract from the defendant a more full and perfect disclosure, for the benefit of the plaintiff. They are never meant, nor intended, nor are they calculated to benefit the defendant, or to put him upon his guard in any respect whatever. The plaintiff may, if he chooses, waive his right to except: and it is always most judicious to do so, where his proofs are ample and at hand; and the character or conduct of the defendant indicates that he is not altogether trust worthy upon oath: for in such case, he will attain his object much sooner and better, by taking the answer at once, as he can get it, and proceeding directly to collect proofs, without loss of time, than by stopping to take exceptions. This is the case where the answer is *an evasive, imper-*

fect response; but yet such a one as goes to the whole bill, and by which each of its allegations is denied and may be put in issue. But to what end, or for what purpose, where no explanation or discovery is sought for by an allegation, should the plaintiff by exceptions call for an answer to it; where it is impliedly, and tacitly admitted by not being answered. In such case, both parties would be delayed and troubled, and the defendant put to much expense without any object whatever.

The general replication puts in issue *only the denial or avoidance of the answer, nothing more;* and neither party is allowed, nor can be called on, to adduce proof respecting any matter not put in issue. The unanswered part of the bill therefore must be admitted, since it cannot be, according to a correct and orderly course of proceeding, proved at the hearing. But if the unanswered allegations of a bill were required to be proved, or to be rejected altogether at the hearing, then the defendant would be allowed to take advantage of his own laches: and a want of frankness and simplicity, altogether unbecoming a court of equity, would be tolerated and encouraged: and the plaintiff would be driven to except, in all such cases, merely to extract from the defendant, either a general denial, or an express, instead of a tacit disclaimer or confession; when, in truth, it might have been the intention of the defendant, as it is fair to infer it was, to concede the unanswered allegation, for the express purpose of avoiding the costs and expense of an answer, of exceptions, and of proofs, by letting a decree by default go for so much as he had left unanswered.

In ancient times, when the defendant used only to set forth his own case, in the answer, without answering every clause of the bill, it was the practice for him to add, at the end of the answer, a general travers, without that, that the matters set forth in the bill are true, &c. But, where the whole bill, and every clause in it, has been fully answered, the adding of a general traverse is rather impertinent than otherwise; and, if issue is taken, upon its general traverse, it is a denial only of every thing not answered before by the answer. 2 *P. Will.* 87. But, there is no case, in which this general traverse has ever been relied upon, as an answer. If it ever had been so considered, it must have occurred, in some of the numerous cases of exceptions to answers, to have insisted on it as such; yet nothing of the kind appears. The whole range of adjudged cases shew, that the extent and compass as well as the sufficiency of the answer, as whether it is as frank as it ought to be, or whether it covers the whole, or only a part of the bill, are to be ascertained from the body of the answer itself: and not from the formal introduction, or the formal general traverse or conclusion of it. But, in this case the usual general traverse, denying the truth of all the unanswered allegations of the bill, has not been added by the way of conclusion to any of the answers.

In the case of *Hopkins vs. Stump, et. al.* 2 *Harr. and Johns.* 301, *Chancellor Hanson* says, "it would seem likewise, that the complainant misunderstood the Chancellor in another particular. But no person, acquainted with the *laws*, or *rules*, or *practice* of this court, would conceive it the meaning of the Chancellor, that whatever matter stated in a bill is not denied, must be considered as admitted. No! If interrogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer plainly, fully and explicitly. If then any material matter charged in the complainant's bill, has been neither denied nor admitted by the answers, it stands on the hearing of the cause *for nought*; this assuredly every lawyer will admit."

This language is strong, indicating that it came from a mind at home upon the subject before it, and that it was thoroughly and perfectly satisfied of the correctness of the positions thus advanced. But, to the latter of them, my mind cannot yield its assent; and, therefore, I have deemed it a respect due to the memory of my predecessor, to set down the authorities, and the reasons which have led me to a different conclusion. From all that has been said upon the subject, it appears to be agreed on all hands, that the plaintiff being entitled to an answer to each allegation contained in his bill, may except to an answer which omits to respond to any of them; that, in Virginia, the plaintiff, by a certain prescribed mode of proceeding, may have the unanswered allegations taken for true, but if he omits to take that course for that purpose, and goes to hearing, he must then prove the truth of the unanswered allegations, or they will be disregarded; that according to *Chancellor Hanson*, the unanswered allegations stand on the hearing of the cause *for nought*, and that in my opinion, all material allegations of the bill, as to which the answer is entirely silent, are on the hearing, *to be taken pro confesso.*

A *fifth* general rule is, that where an answer in the body of it, purports to be an answer to the whole bill, but the respondent declares, that he is entirely ignorant of the matters contained in the bill, and leaves the plaintiff to make out the best case he can, or any language to that effect; and, the plaintiff files the general replication; all the allegations of the bill are thus denied and put in issue; and consequently, all of them, must be proved at the hearing against a defendant who has thus answered. 1 *Ves.* 274.

This in England, is said to be the usual form of the answer of the Attorney General; and no exception can be taken to such an answer; or, indeed, to any answer of the Attorney General, 2 *Mad. Ch.* 335. The same form and rule prevails here, where the Attorney General appears for the State. This also is commonly, the form of the answer of an infant, or a person *non compos*, who answers by his guardian or committee. And, by a long established practice, individuals, who are, in truth, ignorant of the whole matter as to which the bill requires any disclosure; but who are made defendants as having an interest in the matter in controversy, have been permitted, by this general mode of answering, to deny the whole bill, and to put the plaintiff to prove all its allegations at the hearing. 6 *Harr. and Johns.* 291. If, however, it appears from the bill, that the defendant has any knowledge of any matter in it, he may be required to answer more fully and particularly to the extent of his knowledge or belief.

Divesting this case then, of all extraneous matter; of all that relates to the two first administrators of the late *Anthony Hook*; because, this plaintiff is incompetent, in the representative character in which he sues, to recover any thing, but so much of the personal estate of his intestate as remains in specie, or has remained, and is now in the hands of any one, who can be regarded as a trustee for the use of the late *Anthony* and his representatives; of all that which relates to the next of kin of the late *Anthony Hook;* because none of them, as such can have any title, but from one of his administrators, and no such title is alleged or pretended; and also, because none of them are made parties to this suit as plaintiffs; and *Barbara Hagthorp* and *James Hook*, who have been made defendants, are neither charged as, nor make any claim or defence in right of their being two of the legal representatives of the late *Anthony Hook;* and the case, when thus cleared on the part of the plaintiff, is simply this.

By a deed bearing date on the 17th of August, 1797, the late *Anthony Hook* conveyed certain property, therein mentioned, to the late *John Hook*, on the terms specified in the deed; which property came to the hands of the late *John*, and after his death, passed into the hands of *Hagthorp* and wife, as his administrators; and is now held and detained by them, and the other defendants, who claim from, and under them. The plaintiff alleges, that this property, according to the nature and terms of the deed, was conveyed to *John*, as an indemnity; in case and upon condition, that he should pay certain debts, therein specified, which have not been paid; and, consequently, that the late *John Hook* had held, and his legal representatives, and those who claim under them, now hold this property as trustees, for the use of the late *Anthony Hook* and his legal representatives; who is now the present plaintiff: upon which the complainant prays that this property may be accounted for and delivered up, together with the profits thereof.

The whole of this controversy has grown out of the deed of the 17*th of August*, 1797, from the late *Anthony Hook* to his son, the late *John Hook*. This indenture recites, that *Anthony*, being justly indebted to *John Moale*, and thirteen other persons who are named; but the amount due to any, or all of them, is not specified: and then declares, that *John* had agreed to pay those creditors of his father, *Anthony*, their several and respective debts; in consideration of which, and also in consideration of natural love and affection for his son; and of the further consideration of five shillings, *Anthony* conveyed to *John* his leasehold right, to two pieces of land; the one a lot of ten acres, part of the tract called *David's Fancy:* and the other a lot, fronting on *Aliceana street*, in the city of *Baltimore*, together with certain negroes and personal property; all of which are particularly described. The indenture then concludes in these words: "To Have and to Hold the said ten acre lot, and the other lot on *Aliceana street*, for and during all the rest, residue, and remainder of the original terms granted for each respectively, subject to the rents and covenants reserved and contained in the above, in part, recited lease and assignment: and To Have and to Hold all and singular the household and kitchen furniture, plate, and negroes, unto him, the said *John Hook*, his executors, administrators, and assigns, forever. Provided always, and it is the true intent and meaning of these presents, and of the parties hereto, and if the said *John Hook*, his executors, administrators, or assigns, shall absolutely omit, neglect, and refuse to pay the said recited creditors of the said *Anthony Hook*, their several and respective just debts and demands against the said *Anthony Hook*, then this indenture, and every matter, clause, and thing therein contained, shall cease, determine, and be utterly null and void, to all intents and purposes whatsoever; any thing herein contained, to the contrary thereof, in any wise notwithstanding."

This proviso, or condition, is explicit and unequivocal. The estate conveyed to *John Hook*, was to be null and void, on his failing to pay and satisfy the enumerated creditors of *Anthony Hook*. It is, in fact, a conveyance, by *Anthony*, of certain property to *John:* upon condition that he should advance a certain sum of money for the use of *Anthony*. This proviso, with the recital, gives to the whole the shape and character of a pledge or mortgage, from *Anthony* to *John*. It was intended to indemnify *John*, for money advanced by him to the use of his father: and all *John* can claim, by virtue of this deed, is indemnity and reimbursement for any money so by him advanced. In the ordinary cases of a mortgage, the grantor is the actual debtor of the grantee: and it is stipulated that the estate conveyed, shall be absolute, if the grantor fails to pay at the appointed time. In this case, the grantee undertakes to substitute himself in the place of the creditors of the grantor, or to satisfy those claims: and if he fails to do so, then it is stipulated that the estate conveyed, shall be void. The object of the grantor, in both cases, is the payment of his debts; and, in both, security is the object of the grantee. That security, in equity, extends no further than complete reimbursement. The payment of the whole principal and interest due, and no more. 9 *Wheat.* 495. There is no clause in this indenture authorising *John Hook* to sell the property, and to apply the proceeds of the payment of the claims of the enumerated creditors: and even if there were, it would not have destroyed the redeemable quality of this mortgage, or the resulting use arising out of the nature of this deed. 3 *Harr. & Johns.* 106. In this case it is alleged, that the late *John Hook*, and his representatives, have altogether failed to pay the enumerated debts, in compliance with the stipulations of the deed. If so, *Anthony Hook* had, and his representative now has, a right to a return of this property, with its profits: or, at least, to redeem it on the payment of so much as has been advanced by *John Hook*, or his representatives.

It has been urged, that there is not the least room to deduce, from this deed, any thing like an implied or resulting use to *Anthony Hook*, and his representatives: because, it is declared to have been made, not only for a valuable consideration, as the payment of debts, and also of five shillings; but likewise for a good consideration, as the natural love and affection from the father to the son.

The doctrine of a resulting use, first introduced the notion that there must be a consideration expressed in the deed; or, otherwise, nothing could pass—but it would result to the grantor. It is certain, however, that the rule in relation to trusts, by implication, or operation of law, is by no means so large as to extend to every mere voluntary conveyance; and, consequently, if this deed stood alone, upon the valuable consideration of five shillings, and upon the good one of natural love and affection, or upon either of them, unconnected with other circumstances, there could be no doubt of its validity, as an absolute, and effectual conveyance, from *Anthony* to *John. 2 Atk.* 256. But, when other matters are necessarily brought into view, or form a part of the contract, then it is no less clear, that the mere express consideration of five shillings, even with the superadded expressions, "and of other valuable considerations," or of natural love and affection, will not prevent the deduction of a trust by implication or operation of law. 1 *Ves. Jun'r.* 92. 1 *Atk.* 93, 191. 2 *Atk.* 149. And where a trust is declared as to part, or the property is to be applied for a particular purpose, and nothing is said of the residue; what remains, so undisposed of, results to the grantor. 2 *Fonb.* 116, 133.

This indenture cannot be read with a total disregard of its recital and proviso, two of its most important features. We cannot turn aside from clauses, so very striking and efficient, as the recital of the cause of its having been made, and the proviso wherein it is said, if that consideration alone be not complied with, the whole shall be a nullity. If these matters could be entirely passed over, the argument against a resulting trust would be exceedingly strong, if not altogether irresistible. But, looking to the recital, and the proviso, it is perfectly manifest, that the sole object of the deed was to secure the payment of certain creditors of *Anthony Hook.* If they were not paid, the whole deed, utterly regardless of the consideration of five shillings, and of natural love and affection, was declared to be void. The payment of the creditors was, then, that consideration alone upon which the conveyance was to stand or fall. This, is the real extent of the consideration, no more; and to this extent, and no further, the late *Anthony Hook* parted with his right and interest in this property: consequently, in the value of this property, beyond that of the aggregate amount of the specified debts, there is an implied or resulting use, remaining or vested in *Anthony Hook*, the grantor, and his representatives.

But, there is an express saving in the statute of frauds, of trusts by implication or operation of law; nor does the statute affect trust of mere personalty. 10 *Mod.* 404. 3 *Bro. C. C.* 587. Such uses, therefore, might in this case be established by parol proof, if this were not sufficiently manifest from the terms of the deed itself. 2 *John C. Rep.* 409. Let us now, then, turn to the answer and proofs.

Hagthorp and wife have answered jointly. She, before her marriage with *Hagthorp*, obtained letters of administration on the personal estate of her late husband, *John Hook*, and it is in that character only, that they are now brought here as defendants. They say, in relation to the enumerated creditors of the late *Anthony Hook*, "that the said *John Hook* paid the said sums of money, set out in the assignment, so far as the creditors applied for payment of the same:" and again, "that the said *John Hook* accordingly paid the debts particularly mentioned therein, (that is in the deed) as these defendants believe and charge."

It is too late now to inquire whether this answer is as frank and unexceptionable as it ought to have been or not. The only question at this stage of the proceedings, is, whether it be such a response to the bill as constitutes a sufficient defence, if uncontradicted by proof; or whether, as is often said on motions to dissolve injunctions, the answer has sworn away the equity of the bill?

The first of these sentences cannot be considered as a distinct answer to any extent; either, that the debts have, or have not been paid: and the second of them amounts to no more than a declaration of a belief that they have been paid. Where the nature of the transaction, charged in the bill, is such a one as must have been altogether within the knowledge of the intestate, the administrator may answer as he is informed and verily believes; but, the answer of an administrator must always be taken, as well with a reference to the reasons given for his belief, as to the nature of the subject of which he speaks. This, however, is a broad assertion of a belief, without giving any reasons for it; or its appearing, or being alleged, that the matter was exclusively within the knowledge of their intestate. In these particulars this answer is not so responsive to the bill as to constitute an available defence.

But, according to the bill and the deed, which is made a part of the bill, *John Hook* undertook to pay certain debts due from *Anthony Hook.* The answer to this charge must, then, from the nature of things, be such a one as would furnish evidence available to *Anthony* or his representative: it is that, the bill seeks. For, by the deed, *Anthony* was to be protected from the claims of his creditors; and upon *John's* affording that protection his title rested. In effect the bill asks, not only whether the debts have been paid, or not; but more, it requires the evidences of their payment to be produced, as a means whereby *Anthony*, and his representatives, may be protected against those claims; and such evidence, in addition to any thing that might be said in the answer, is also necessary; because it constitutes an affirmative part of that title set up by *John Hook's* representatives, in opposition to the plaintiff's claim; and must therefore be supported by indifferent testimony. All the claims of the enumerated creditors which have not been paid, it is most likely have been long since barred by the statute of limitations; but *that* is a protection which the law itself gave to *Anthony.* He is entitled, by the terms of his deed, to be furnished by *John* with the *evidence* of their being satisfied, as the means of his protection in *that form.* This answer, therefore, is not for these reasons also, so responsive to the bill as to afford the defendants an adequate defence. On adverting to the proofs and exhibits, it appears that *John Moale's* is the only one of the specified claims that has been satisfied; and none others are to be allowed as paid.

I lay out of this case the testimony of *Henry Burman*, who, as the husband of one of the distributees of *Anthony Hook*, has an interest in establishing the facts to which he testifies, and is, therefore, incompetent. All the other witnesses are competent. From the copy of the unexecuted bond, the declarations of *Bishop Carroll*, and the other occurrences and proceedings in the *Orphans' Court* found amoung the proofs, it appears to have been perfectly well understood between *Anthony* and *John*, during their lives, that *John* held, as the trustee of *Anthony*, according to the terms of the deed; and it appears, that the representatives of *John* always admitted, that they held under the deed; and yet, except the claim of *John Moale's*, it does not appear, that they ever undertook to shew, that any of the claims of the enumerated creditors had been satisfied. It lay upon *John* and his representatives to shew, that those claims were paid; and they have not done so, and the truth is therefore that, except *Moale's* claim, none of them have been satisfied.

The answer of *Hagthorp* and wife, after some preliminary notices of several allegations in the bill, and those responses, as to the payment of the enumerated debts, passes on to a long history of the sayings, actings, and doings of sundry of the next of kin of the late *Anthony Hook*, in relation to the ten acre lot; as to all of which, for the reasons already assigned, it will be unnecessary to say any thing further. The bill specially charges, that *Hagthorp* and wife, by a deed dated on the 23*d day of December*, 1819, leased, or assigned, a part of the lot on *Aliceana street*, to *Matthew Bennett*. Of these special allegations, these defendants take no notice; but say, that the late *Anthony Hook*, by an indenture dated on the 8*th day of May*, 1797, conveyed the lot on *Aliceana street*, to the late *John Hook*. This is an allegation in avoidance of the bill, and certainly required to be supported by proof. But their is not even an exhibit, nor one tittle of proof in relation to it. This part of the answer, therefore, passes for nothing.

As to all the allegations of the bill, in relation to the negroes, and other moveable property mentioned in the deed, this answer is absolutely and totally silent—it says nothing: and, consequently, as to so much the bill must, according to the rules that have been laid down, be taken *pro confesso*.

Upon the whole, then, and from what has been said, it follows that the defendant, *Hagthorp* and wife, as the legal representatives of the late trustee, *John Hook*, *will* be decreed to deliver up to the plaintiff, all the property mentioned in the deed; or to pay the value of so much as they may have converted, or fail to deliver, together with the profits thereof, or the interest on the value; except certain allowances, and those parts wherewith the other defendants may be charged, as I shall now proceed to enquire and determine.

All the other defendants deduce their title, either directly or indirectly, from *Hagthorp* and wife, except *Nathaniel Chittenden*, who traces his claim from the late *John Hook.* But all allege, that they are purchasers for a valuable consideration, without notice. There is no principle of equity better settled, than that such a purchaser will not be disturbed by this court. On the other hand, it is equally well settled, that he who purchases with a knowledge of the trust, becomes himself the trustee, and stands in the place of the vendor, under whom he thus claims, subject to all his liabilities. Yet a person having himself notice, who purchases of one who had not notice, may protect himself by the want of notice in his vendor; nor shall a purchaser without notice, or a previous purchaser with notice, be affected by the notice of his vendor: and where a purchaser cannot make title, but by a deed, which leads him to a knowledge of the fact; and more especially where the deed, by virtue of which he takes, recites, or directly refers to that instrument in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a purchaser with notice. These are the well established principles of equity upon this subject. 2 *Fonb.* 147, 151.

William McMechen, in his answer, avers that he is a purchaser, for a valuable consideration, without notice; and yet makes an exhibit, by his answer, as a part thereof, of a deed dated on the *9th of September*, 1803: under which he takes from *Hagthorp and wife*, in which the indenture from *Anthony Hook to John Hook*, out of which the trusts arise, is clearly and distinctly referred to as one of the links in the chain of the title of *Hagthorp* and wife. This, of itself, is enough to shew that *McMechen* is a purchaser with notice. But the proofs leave no doubt upon the subject: they shew, that he had ample notice.

This defendant, therefore, *will* be decreed to deliver up and reconvey to the plaintiff whatever of the ten acre lot, thus acquired by him, he may now hold: and to account for the rents and profits thereof, from the date of the deed under which he obtained possession, with such just allowances as he may be entitled to; the nature of which shall be specified.

Samuel Moore and *George A. Hughes* answer jointly; they positively aver, that they are purchasers of *William McMechen*, for a valuable consideration, without notice. But they exhibit no evidence of title, nor any proof of right whatever. According to the rules and principles before laid down, they cannot be permitted thus to swear themselves into the estate of the plaintiff; and consequently, even if their answer were in other respects fully responsive to the bill it could not avail them as a defence, unsupported, as it is, by proof. These defendants *will*, in like manner, be decreed to deliver up and reconvey to the plaintiff the proper y held by them; and be also charged with rents and profits, from the 1*st day of May*, 1818, when it appears they obtained possession.

John Cator, by his answer, states, that he purchased of *McMechen* that which he holds. His predicament and pretensions are similar, in all respects, to those of *Moore* and *Hughes.*—*Cator*, therefore, *will* likewise be decreed to deliver up and reconvey, and also to account for the rents and profits of what he holds, from the 1*st of May*, 1818; when he was let into possession, with such just allowances as shall be specified.

John S. King, by his answer, states, that he leased from the defendant, *Cator;* but having exhibited no better title than his lessor, *will* be in a like manner, ordered to deliver up, reconvey, and account for the rents and profits, to the plaintiff, from the 9*th of March*, 1819, when he took possession.

John Weaver, in his answer, says that he, too, is one of those who purchased of *William McMechen*. This defendant has also left his answer entirely destitute, and wholly unsupported by any exhibits or proofs. He *will*, therefore, be decreed to deliver up, reconvey, and account for, the rents and profits to the plaintiff. He admits that he obtained possession in the year 1819; but does not specify the day or month. A medium, in the absence of proof, *will*, therefore, be taken; and the account *will* commence on the 1st day of July, of the year 1819, with such just allowances as shall be specified.

The defendant, *John Fitzgerald*, in his answer, states that on the 4th of September, 1806, he purchased of *John H. Hall*, a part of a parcel of ground, containing ten acres; part of a tract of land called *David's Fancy:* that he gave for it a valuable consideration; and had no notice of the claim of the representatives of the late *Anthony Hook.* He then goes on to state, that he purchased of the defendant, *Hagthorp*, two other parcels of the same ten acre lot; the one on the 9th of August, 1810, and the other on the 17th of June, 1815; and that he purchased a fourth parcel of it, on the 17th of September, 1811, of *Gerard Tipton;* for all of which, he avers, he paid a valuable consideration, and that he had no notice of the claim of *Anthony Hook's* representatives. This answer is also entirely unsupported by any evidence whatever; and, therefore, this defendant *will* be decreed to deliver up, and reconvey to the plaintiff so much of the ten acre lot, mentioned in the bill, as he holds: and *will*, also be held accountable for the rents and profits thereof, from the dates when he obtained possession of each parcel respectively. The nature of the just allowance to which he may be entitled, *will* be described.

Benjamin Rawlings, surviving executor of the late *William Rawlings*, states, that his co-executrix, *Catharine Rawlings*, who had been made a defendant, is dead: that he is in possession of part of the ten acre lot in the bill mentioned, by virtue of a deed bearing date on the 10th day of September, 1804. This answer is also entirely unsupported by proof. This defendant *will* be decreed to deliver up and reconvey the property, so held by him to the plaintiff; and be charged with the rents and profits, as executor, from the date of the deed under which his testator obtained possession; with such just allowances as shall be specified.

The defendant, *Matthew Bennett*, in his answer, says, that he is in possession of a part of the ten acre lot mentioned in the bill, which he holds under a conveyance from *Hagthorp and wife*, dated on the 3d day of August, 1810. But this defendant, too, has left his answer entirely destitute of proof. The bill expressly alleges, that *Hagthorp* and wife, by deed, dated on the twenty-third day of December, 1819, leased a part of the lot on *Aliceana street* to *Matthew Bennett:* in relation to which, this defendant says nothing in his answer. This allegation of the bill, as against him, must therefore be taken for true. He *will* be decreed to deliver up, and reconvey all the property held by him, to the plaintiff: and to account for the rents and profits of each parcel from the time he took possession.

The defendant, *Nathaniel Chittenden*, admits that he holds possession of the lot on *Aliceana street* to which he derives title, through various mesne conveyances, from the late *John Hook*. He avers that he, and those under whom he claims, were, all of them, purchases for a valuable consideration, without notice; but produces no proof in support of the allegations of his answer. He *will* therefore, in like manner, be decreed to deliver up and reconvey the property, so held by him, to the plaintiff; and be held accountable also for the rents and profits.

The defendant, *James Hook*, on the 7th day of February, 1823, filled his answer; and he says therein, to the *amended bill* of the complainant; but there does not appear to have been any amended bill put upon the record until some time after that day. There is, however, no charge whatever made against this defendant, and therefore the bill *will* be dismissed, as to him, with costs.

I have said, that the *recital* and *proviso* in the indenture of the 17th of August, 1797, from *Anthony Hook* to *John Hook*, gave to that instrument the features and character of a mortgage. Consequently, the original parties stood and their legal representatives now stand in the relation to each other of mortgagor and mortgagee, or trustees, and *cestui que* trusts. No acts, or circumstances appear to have occurred to destroy the redeemable quality of that deed. *Hagthorp* and wife, as administrators of the late *John Hook*, have succeeded to his character of trustee, and the defendants who all claim under them, except *Nathaniel Chittenden*, who derives his claim from the late *John Hook*, as purchasers with notice for so much as they hold, stand charged with the same trusts.

The whole of the property mentioned in the bill has been continually in the possession of the late *John Hook*, anb those who have succeeded to, and claim under him, ever since the year 1797. They have protected it, relieved it from burthens and charges, and have placed upon some parts of it lasting improvements. It now, therefore, only remains to apply the rules of equity in relation to these matters, and to direct how the accounts shall be stated.

If a mortgagee, without the assent of the mortgagor, assigns the mortgaged estate to an insolvent person who he puts into possession, he will be held answerable for the rents and profits received both before and after the assignment; upon the principle, of its being a wilful breach of trust, to transfer the property to another, which, as trustee, he had no right thus to dispose of, to the prejudice of the mortgagor. *Pow. Mort.* 948. *2 Fonb.* 179. A trustee is, in no case, to be charged with imaginary values, but only with what he actually receives: and the same rule applies to a mortgagee, in possession, who is regarded as a trustee. But no default must be imputed to him; for in all such cases, he will be charged with what he might have made, but for his default. The annual value is that which the premises are actually worth nett, according to a fair estimate, clear of all necessary charges.

Under the head of just allowances, it has long been the course of the court to allow a trustee, or mortgagee in possession, for all necessary expenses incurred for the defence, relief, protection and repairs of the estate: such as costs of suit, and fees for taking opinions and procuring directions necessary for the due execution of the trusts, 10 *Ves.* 184, taxes, paving contributions, ground rent, and sums expended in necessary repairs. *Pow. Mort.* 956, *n.* 2 *P. Will.* 455. It has been also said and I think with justice, that where a mortgagee, thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he should be allowed the value of them. *Pow. Mort.* 956, *n.* And in a modern case, the value of new buildings, erected by the mortgagee, was allowed, 4 *Ves.* 482, and a liberal allowance for the improved value of slaves while in the possession of the mortgagee, was directed to be made. *Ross vs. Worrall*, 1 *Wash.* 14. The grounds of these decisions appear to be, that a mortgagee in possession, is the legal holder of the estate; which the mortgagor may at any time redeem and so prevent him from making any repairs or improvements, and if the mortgagee has been long in the possession, claiming adversely, and suffered to treat the estate at his own, and the mortgagor stands by and permits lasting improvements to be made, he shall pay for them. 5 *Harr. & Johns.* 147. 4 *John. C. Rep.* 122.

But the estimate of the value of such lasting improvements is to be taken as they are at the time of accounting or passing the final decree. For such allowances are made upon the ground, that the improvements do, in fact, pass into the hands of the plaintiff as a new acquisition. And they can only be a new acquisition to him, to the extent of their value at the time he recovers or obtains possession of them; and therefore their value at that time is to be allowed, and nothing more. 3 *Rob. Adm. Rep.* 101. It is also necessary to observe that in charging rents and profits, the estimate must not include any profits which arise exclusively from such improvements; for, if they were to be embraced by the estimate, the occupier would, in fact, be paying for the profits of that which was his own; and the plaintiff would be allowed to derive the benefit from a new acquisition before the court had awarded it to him. Therefore, the estimate of rents and profits must be made, in exclusion of such as appears to have arisen from the occupying claimant's own expenditure in improvements. 1 *John. C. Rep.* 388.

In this case, the late *John Hook* disposed of the lot on *Aliceana street*, and his representatives *Hagthorp* and wife, having disposed of the other property in a manner in which they had no right to do, and the bill standing unanswered, and for true, as to the negroes and moveable property, *Hagthorp* and wife must be charged with the value of the whole of that property, and interest thereon, from the date of the deed from the late *Anthony Hook* to the late *John Hook*, and the account for the rents and profits of the chattels real, will commence from the same date. *Hagthorp* and wife must be charged with the rents and profits of all the chattels real, mentioned in the bill up to the time when they, or any part of either passed into the hands of any of the present defendants. But *Hagthorp* and wife will be held liable for the whole amount charged against the other defendants, or to the amount which all, or any of them may fail or be unable to pay to the plaintiff, and these defendants must be credited with the amount of the debt which was due from *Anthony Hook* to *John Moale* at the time of the execution of the deed to *John Hook*, with interest thereon, from the time when it appears to have been paid.

The account against each of the other defendants will commence from the day on which it appears by his answer, or by the proofs now in the cause, or which may hereafter be exhibited, that he obtained possession, and he will be charged for all the time he held that portion of the property, or until it passed into the hands of another of the defendants. The account against each of the defendants who is now a holder of any portion of the property is, for so much as he holds, to be brought down to the time of taking the account.

Whereupon, it is ordered, on this 5th day of December, in the year 1826, that this cause be, and the same is hereby referred to the Auditor, with direction to state an account, or accounts, accordingly; from the proceedings and proofs now in the cause, or such other proofs as may be laid before him by the parties: and it is further ordered, that the parties be, and they are hereby allowed to take such testimony as they may think proper, in relation to the accounts so directed to be stated by the Auditor; on giving to the opposite party or his or their solicitor three days notice as is usual. Provided, that no testimony shall be used before the Auditor, or, in any way admitted into this cause, unless it be taken and filed with the Register, on, or before the 15th day of January next. From this order the defendants appealed to this court.

The cause came on to be argued before Earle, Archer and Dorsey, J. when,

Williams, (District attorney of *U. S.*) and *Learned* for the appellee, moved the court to dismiss the appeal, upon the ground that an appeal did not lie from the order of the Chancellor in this case, as it did not settle any question of right between the parties. They referred to *Snowden vs. Dorsey*, 6 *Harr. & Johns.* 114. *Thompson vs. M'Kim*, *ib.* 327, and *Oehler vs. Walker*, 2 *Harr. & Gill*, 326, 329.

Moale and *R. N. Martin* against the motion, referred also to *Snowden vs. Dorsey*, and *Thompson vs. MKim*, and to *Strike vs. M'Donald*, 2 *Harr. & Gill*, 191.

Dorsey, J. delivered the opinion of the court.

A motion being made to dismiss the appeal to this court, on the ground, that the Chancellor decided nothing in controversy between the parties which can properly form the basis of an appeal; to present a view of the question, but few of the facts contained in the record need be stated. The appellee sought to recover certain leasehold and personal property, with the rents and profits arising therefrom. The right to such recovery being resisted by the defendants, and much testimony in relation thereto, being taken under commissions issued for that purpose; after the case had been argued, the Chancellor, in his explanatory or introductory remarks to what he was then about to order, discusses at great length many rules and principles of equity and a great variety of facts, all of which he considers clearly in favour of the appellee, and announces his intention at some future time to decree accordingly: and to enable him to do so, he passed the following order, viz: (See the order ante, p. 307.)

From this proceeding of the Chancellor, the present appeal has been prosecuted; and the only question submitted to our consideration is, does this order so settle or materially affect all or any of the rights or interests in controversy between the parties, as to make it a decretal order from which an appeal would lie agreeably to the provisions of the acts of Assembly of 1785, *ch.* 72, and 1818, *ch.* 193? We are clearly of opinion that it does not. To ascertain what has been decided by the Chancellor, we must look to the order itself. If its expressions be explicit, unequivocal, we need search no further for its import; but must give it that interpretation which it bears upon its face. If its construction be ambiguous; then, as the best key to its exposition, we must refer to the introductory remarks of the Chancellor upon which it was founded. In the present order there is no doubt, no ambiguity; and its operation cannot be enlarged by the prefatory observations with which it is connected. Indeed, they are in perfect accordance with its literal, obvious meaning; and demonstrate, that all which the Chancellor designed to adjudicate, was, that the auditor should state certain accounts indispensable to the determination of the questions in litigation. Such an order is a mere preparative to the decisions of the cause; and not *decretal.* Tis true the Chancellor, in considering this case, has discussed all the matters both of law and fact, which he deemed in any wise involved in the decree, eventually to be pronounced; and has distinctly declared what he *intends* to decree. But his *intentions* form no ground for an appeal: he may abandon or change them *ad libitum;* until carried into effect, no injury can result from them. It is only, from what he has *done*, and not from what he *intends to do*, that an appeal will lie. All that he has done is to direct an audit: every disputed right and interest of the parties remains undetermined; and is, by the express declaration of the Chancellor, to be settled by his future decree. Until such decree be passed, upon application a commission to take further testimony might issue, an unquestionable title to the relief prayed for might be made out. If we now sustain the jurisdiction we are called on to exercise, and, in accordance with the appellants views, dismiss the appellees bill of complaint: we deprive him of all such opportunity of strengthening his claims for relief; we in fact become a court of original not of appellate judicature. We usurp the authority of the Chancellor, and reverse decrees which he never did make, and perhaps never would have made. Such a proceeding is utterly inconsistent with the character and attributes of a Court of Appeals.

But reasoning upon this subject is unnecessary: the question is put to rest by the authority of *Snowden et al vs. Dorsey et al.* 6 *Harr. & Johns.* 114: a case not distinguishable from that now before us. There the Chancellor upon a bill filed for the conveyance of land, ordered an account to be taken of the rents and profits; and in the statement of his views introductive of that order pronounced his opinion (as here) that the complainants claim to relief had been established. Yet, upon an appeal from such order, after argument, and a thorough examination of the practice and decisions upon the subject, this court dismissed the appeal, as being prematurely taken to an order, not decretal.

It was urged in the argument of the appellants counsel, that the right of appeal in this case was fully established by the doctrine settled in *Thompson vs. M'Kim*, 6 *Harr. & Johns.* 302. But the cases are in no wise analogous. There, as is justly observed by the Chancellor, to warrant the issuing of the order, the facts must be "either admitted or so established as to be open to no further controversy at any subsequent stage of the proceedings; and the party making the motion for such order must shew that he has an interest in the money called in; and that he who holds it in his possession, has no equitable right or title to it whatever." Here to justify the order for an audit, no such conclusive establishment of facts is indispensably necessary. There material and irreparable injury was done by the order, let the subsequent decree of the Chancellor be what it might, or although no future decree be ever made. Here no material injury is inflicted on the appellants unless followed by a decree; and that decree too against them. Here the order is not decretal or final as to the rights or interests of the appellants. There the order is not only decretal, but in effect final upon the rights and interests of the appellants, and needed not the aid of any future decree or order upon the subject. *Ex natura rei*, the granting the order to bring the money into court, adjudicated on every right and interest which the appellant claimed. In no future order or decree was it necessary to name or even refer to him; as to all subsequent proceedings, he was no longer a necessary party in court. All that remained to be done in the cause was, an order for the distribution, among the creditors of *Heyland* of the money brought into court.

Strong efforts were made in the argument to distinguish this case from that of *Snowden et al. vs. Dorsey et al.* founded upon an expression in the courts opinion, in *Thompson vs. M'Kim*, stating that the order passed in *Snowden et al. vs. Dorsey et al.* "bore no impress of the Chancellor's judicial opinion upon the merits of the case." The order, it was contended, in the case at bar, did bear such an impress. But the weight of the argument rests upon a misconception of this expression of the court. They did not mean to say, that the introductory remarks to the order in *Snowden et al. vs. Dorsey et al.* bore no impress of the Chancellor's opinion upon the merits of the case; because the reverse is most palpably the fact: it does bear the impress of his opinion: but not of his "judicial opinion." The impress of the Chancellor's "judicial opinion," in the sense in which the court have used it, being synonymous with, what he has adjudged or decreed.

APPEAL DISMISSED, BUT WITHOUT COSTS.

DANELS *vs.* TAGGART'S Adm'r.—December 1829.

T died in a foreign country, leaving his partner K his executor there; who, upon his return to *Maryland*, renounced all right to administer upon T's estate here. Letters of administration were then granted to the complainant, who filed a bill against K and D, requiring an account and settlement of various claims; some of which related exclusively to transactions of a partnership which had subsisted between K. D. and T.; others, to demands of the intestate against both of his surviving partners; and others, to misapplications of the intestate's property, by both and each of them after T's death. The dates of these transactions were not alleged. To this bill, D pleaded in bar, "That he finally settled and adjusted with K, executor of T deceased, after the death of the said T, an account in writing, and by said account, the balance due to the defendant by the estate of the said T on the 25th Oct. 1823, was admitted to be, &c. which account is just and true." The complainant demurred. The Chancellor overruled the plea, and ordered the defendant to answer over. HELD, that an appeal did not lie from this order, which decided a mere question of pleading, and settled no right between the parties, and that this plea was void for uncertainty.

The plea of an account stated to such a bill as the present, cannot be sustain-

ed, unless it be supported by answer, denying the receipt of any part of the money, for which the defendant is called upon to account, subsequently to the time when the account stated, was adjusted.

By taking issue on a plea in equity, the plaintiff admits its sufficiency as a bar, if the facts which it asserts are established by proof; and if on such an issue, the matter of the plea is proved, the bar is complete, and the bill must be dismissed.

Appeal from the Court of Chancery. The bill of complaint, in this case, was filed on the 9th of November, 1824, by *William Taggart*, administrator of *Henry Taggart*, (now appellee) against *John D. Danels*, (the appellant) and *John C. King*. The bill stated, that the testator, *Taggart*, *Danels* and *King*, as partners in trade, were the owners of a considerable amount of property and *choses in action*, and were largely indebted to others; that the testator, besides his undivided interest in this firm, had a large amount of separate property of his own, consisting principally of vessels, and of debts due from this firm of *Taggart & Co.* and others; that thus situated, *Henry Taggart* died, leaving his partner, *King* as his executor; that afterwards *Danels* and *King*, took, collected, and applied, nearly the whole of the testator's property, as well as that which he had held in partnership with them, as that which was exclusively his own, and applied it to their joint use and benefit; that a part of the testator's property was taken and applied by *Danels* to his own individual use; and that *King* having renounced the office of executor of *Henry Taggart* in this State, administration was granted to the complainant, who now calls on *Danels* and *King* to account for the property so taken and used by them.

The defendant, *Danels*, "by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained, to be true, in such manner and form as the same are therein and thereby alleged and set forth, and as to all relief prayed in and by the complainant's bill of complaint, and as to all the discovery thereby prayed, save and except so much thereof as prays this defendant may discover if any account has been settled, by this defendant, with the said *Henry Taggart* in his life time, or with his executors since his death, doth plead in bar, and for plea says, that he this defendant, finally settled and adjusted with *John C. King*, executor of the estate of *Henry Taggart*, deceased, after the death of the said *Taggart*, an account in writing, and by said account the balance in writing due to this defendant by the estate of the said *Henry Taggart* on the 25th of October, 1823, was admitted to be $38,341 16, which account is just and true to the best of this defendant's knowledge and belief."

The complainant "by protestation, not confessing all or any of the matters and things in the plea of the defendant *John D. Danels*, contained, to be true in such manner and form as therein set forth and alleged, does demur to the said plea; and for causes of demurrer, among other causes of demurrer, shows that the said plea is not accompanied, as part thereof, by the account therein referred to; and further, that the said plea is no answer to, and does not undertake to answer the fraud and combination alleged in the complainant's bill; and that the said plea in no respect answers or meets the charges of said bill, or precludes the relief therein sought, or bars the inquiry therein made. Wherefore, and for divers other good causes of demurrer appearing in said plea, this complainant does demur thereto, and he prays judgment of this honorable court, whether he shall be compelled to make any farther and other reply to the said plea; and he humbly prays that the said *Danels* may be compelled to answer over to the said bill of this complaint, &c."

The defendant, *King*, filed an answer to the bill.

Bland, Chancellor. (December term,) 1825. This case standing ready for the hearing on the demurrer to the plea of *Danels*, the counsel on both sides were heard, and the proceedings were read and considered.

It appears from the allegations of the parties, (and here the Chancellor stated the substance of the bill as before,) to which *Danels* pleads an account settled with *King*, as executor of *Taggart*, in bar; to which plea the complainant has demurred. The plea of *Danels* is intended as a bar to the complainants prayer, for an account and relief grounded on the three charges of his bill.—*First*, that *Danels* and *King* have taken, or converted to their own use, the testator's undivided interest in the property of the firm of *Taggart*, *Danels* and *King*. *Secondly*, that *Danels* and *King* have taken, or applied to their own use, the testator's separate property; and *thirdly*, that some portions of the testator's property have been taken or applied by *Danels* alone, to his individual use. If the demurrer to this plea be sustainable, as has been urged, on the ground, that the settled account thus pleaded, is not such a one as could, in any form, be pleaded in bar to this bill, it will relieve the court from the necessity of noticing any thing else, that has been pressed upon its attention in the course of the argument.

A settled account, is an adjustment of the adverse pretensions and claims of two or more parties; or a mutual compromise and arrangement of their respective debits and credits. It is, in effect, an agreement between the parties; and operates reciprocally like all other contracts and agreements. The idea of a settled account, or of a contract or agreement, therefore, necessarily involves the notion of two parties, the one contracting, and the other contracted with; or of parties who mutually agree together in relation to a particular subject. And this notion, as to two parties, also necessarily supposes each of them have not only a capacity to contract, but in almost every instance, a capacity to sue and be sued. But the capacities to contract and to sue, with which each adult citizen is endowed, in general is without limit, for the disposition and protection of his property and person against all others, may be, and are, in many instances, by the particular nature of the subject of the contract or suit, enlarged, modified or extinguished. And the general capacity of an individual to contract or to sue, may also be circumscribed or fettered by his representative or official character, or by the peculiar relationship to others, in which he may be placed. These positions need no illustration.

Now as to the case before us; let it be supposed, that *Taggart* and *King* only, had constituted this firm or copartnership; in that case it must be admitted, that when, on the death of *Taggart*, the two characters of surviving partner and executor devolving upon *King*, and became united in himself, he could not contract or sue respecting the undivided interest of the testator *Taggart;* because *King* could not contract with or sue himself; and while he chose to act as executor, there would be no other party representing *Taggart's* interest to contract with or to sue. And, therefore, if *King*, the executor and surviving partner, was the debtor of his testator, that debt, by operation of law, would become assets in his hands for the benefit of the creditors and representatives of the deceased; and, if he was, on the other hand, a creditor, he might retain out of the assets of the deceased the amount of his claim against all others. In such case, it seems to be quite clear, that *King* could not have the capacity, in any manner, to make such a settlement of accounts, of himself alone, of the partnership affairs of *Taggart* and *King* as would be pleadable in bar of a bill like this, brought by the administrator of *Taggart* against him for an account.

But, in this case, *King* is not the only surviving partner—there is another, *Danels;* and it is *Danels* who pleads the settled account with *King* as executor in bar. But the union of two interests in *King*, that of his own, and his testator's, had deprived him of the capacity to make any binding settlement, or agreement as to his testator's share in relation to his own. This alleged settlement then, if binding at all, or in any way, could only operate between *King* and *Danels;* but the whole partnership affair, as between *Taggart* and *King* would remain open, or unaffected by it. This plea avers and sets out the balance, between *Taggart* and *Danels.* But in a partnership or joint trade, carried on by three or more persons, it is impossible to settle an account with some of the members of the partnership, so as to ascertain the balance due from any one, to any other member of the concern; and more especially so, as in this case, where the partner as to whom the balance is to be ascertained, is himself a creditor of the firm. Wherever a balance is spoken of as the result of a settlement of partnership accounts, a partial estimate is never understood. It is the result of the adjustment of the whole and entire partnership concerns.

It is true, that these three partners *Taggart*, *Danels* and *King*, as to their respective rights, might have made any special agreement, or settled in any manner they thought proper, either in person or by their agents duly authorised. But *King* as executor had only the general authority incident to his office; and this plea of *Danels* is not based upon any special agreement of any sort; but upon a general settlement of the entire partnership accounts, and sets forth a balance which could only be the result of such an entire settlement. In this case, however, no such settlement could have taken place, in the manner alleged in the plea, with *King* as executor of *Taggart;* because *King* was incapable of settling, or agreeing with himself as partner and executor, and, consequently, *Taggart's* interest in the alleged settlement could not have been represented and protected by any one capable of settling and contracting for his rights. For as to the testator's rights and his interest, it was as if a settlement had been made during his life time, between *Danels* and *King*, at which *Taggart* was not present, and of which he had no knowledge. So far then as this plea relates to a settled account of the partnership affairs of *Taggart*, *Danels* and *King*, it has no foundation and cannot be sustained.

The bill charges, that the testator's separate property was also applied to the joint use of *Danels* and *King*, and prays, that they may account for that likewise. As to the testator's separate personal estate, there can be no doubt, that his executor, *King*, might have disposed of it, in like manner, as his testator might have done. And if *King* had wasted it, in any way, he himself would have been chargeable with the *devastavit;* but the right of any one, fairly acquired, from him would be unimpeachable. If *King*, as executor, had settled an account with *Danels*, as to any dealings which *Danels* had respecting the separate estate of the testator, such a settled account might have been pleaded in bar, of a bill brought against him for an account of such dealings; because, such a plea, in such a case, would be a fair and direct avoidance and defence to such a bill.

But this bill presents a case which is formally and substantially different. In equity, as well as at law, the plaintiff can only have relief, or recover according to the nature of his case; and the *allegata* and *probata* must substantially correspond. The charge, in this case, is, that *Danels* and *King* jointly converted the property of the testator, to their joint use and benefit. This charge cannot be sustained by proof, that either of them, separately converted it to his own separate use. They are charged as joint wrong doers, who have derived a joint benefit and advantage from their wrong; and the proof, when produced, must be applicable to that charge, or it is foreign from the case. Now it certainly cannot be, that joint wrong doers, any more than joint agents, will be allowed to plead a stated account between themselves, as a bar to a bill against them, for an account of the property so by them converted. In equity, those who have jointly taken and used the property of another; are considered as his trustees or bailiffs, and as such are held accountable. This objection to this plea, applies with equal force, and is an additional objection to it, so far as it relates to the undivided interest of the testator in the partnership funds, which the bill charges *Danels* and *King* with having taken and converted to their joint use.

As to the third charge, about which the bill calls for an account; that is, as to the property of the testator *Taggart* which came into the hands of *Danels*, and was applied to his individual use. If there had been a settlement of accounts between *King* as executor of *Taggart* and *Danels* in relation to such property, and such settlement had been properly pleaded, it would have constituted a good and sufficient bar to this charge in this bill. But the plea under consideration is not such a one, It is a plea in bar of all the relief, and all the discovery prayed by the bill, founded on a settlement of accounts between *Danels* and *King* as executor of *Taggart*, comprehending all the subjects set forth in the bill; and it avers a balance to be due from *Taggart's* estate unto *Danels*, as the result of that general, comprehensive settlement of accounts. In pleading an account stated, as a bar, it is essentially necessary to set forth the particular balance found to be due. But if, as in this case, it appears, that the balance thus set out, and which it is essentially necessary should be averred to constitute a good plea of an account stated, is deducible from a statement, and is the result of a settlement, the greater part of which was of no avail, or was improper, it follows, that such plea must be considered as substantially defective, in one of its most essential parts. It is as substantially deficient as it would have been, if it had been wholly silent as to the balance ascertained to be due; since a specification of a balance derived from a source manifestly vicious, is as no statement of any balance whatever.

Upon the whole it is considered, that this plea is bad; *first*, because *King* being himself executor and surviving partner, could not, and had not the capacity to make such a settlement with *Danels* of the partnership affairs of *Taggart*, *Danels* and *King*, as *Danels* might plead in bar of this bill; *secondly*, this plea is bad, because, the bill charges *Danels* and *King* with having jointly converted to their own joint use, as well the undivided partnership property as the separate property of the testator, and to such a charge, a settlement between *Danels* and *King* can be no bar; and *thirdly*, this plea is bad, as to so much as relates to property of the testator alleged to have been converted by *Danels* to his individual use; because, the balance set out in the plea is shown, by the general reference to the whole bill, to be the result not merely of an account of such property, but of that inclusive of all the other transactions stated in the bill, respecting which, an account between *Danels* and *King* could be of no avail against the complainant. *Decreed*, that the plea of the said *Danels* be, and the same is hereby overruled; that the demurrer be sustained; and that the said *Danels* do make a full and sufficient answer to the complainant's bill of complaint, and the matters therein charged.

From this decree *Danels* appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, ARCHER and DORSEY, J.

Winchester, for the appellant. The bill of complaint in this case is simply a bill calling for an account, and being so, the plea of an account stated is a flat bar. The plea is in proper form, and is a proper answer to such a bill. *Mitf. Plead.* 210,

211. The bill does not charge fraud, nor allege any account stated, nor fraud in stating any account. The plea is, therefore, a proper answer to the bill. *Cooper's Plead.* 279. 1 *Madd. Ch.* 81 (83.) Fraud cannot be proved, unless it is alleged in the bill. *Westly vs. Thomas*, 6 *Harr. & Johns.* 28. A surviving partner may be executor to his deceased copartner, as well as a debtor or creditor be executor to his creditor or debtor;—and as such settle all the affairs of the partnership, *Burden vs. Burden*, 1 *Ves. and Beames*, 170.

Mayer and *Taney* (attorney general) for the appellee. The doctrines of a plea of an account stated; and whether or not the plea here pleaded is applicable to such a case as this, are fully commented upon and laid down in *Cooper's Plead.* 277, 279, 252, 225, 228, 229, 282, 283. *Mitf. Plead.* 208, 209, 211, 236. *Beames Pl. Eq.* 229, 226, 237. *Taylor vs. Haylin*, 2 *Bro. Ch. Rep.* 310. *Vernon vs. Vawdry*, 2 *Atk.* 119. *Drew vs. Power*, 1 *Sch. & Lef.* 182, 192. *Kinsman vs. Barker*, 14 *Ves.* 579. *Newman vs. Payne*, 2 *Ves. jr.* 200 *Middleditch vs. Sharland*, 5 *Ves.* 87. *Beaumont vs. Boultbee*, *Ib.* 485. *S. C.* 7 *Ves.* 599. *S. C.* 11 *Ves.* 358. *Lady Ormond vs. Autchinson*, 13 *Ves.* 47. *Chambers vs. Goldwin*, 5 *Ves.* 835. *S. C.* 9 *Ves.* 265. *Roberts vs. Kuffin*, 2 *Atk.* 112. *Roche vs. Morgell*, 2 *Sch. & Lef.* 725, 727, 728. *Bayley vs. Adams*, 6 *Ves.* 586, 596. *Goodrich vs. Pendleton*, 3 *Johns. Ch. Rep.* 384. *Hawkey vs. Simpson*, 3 *Atk.* 303.

Where the party is not presumed to have a counterpart of the account, it must be produced with the plea of an account stated. Here, it could not be presumed, that the complainant had any knowledge of the settled account. *Willis vs. Jernegan*, 2 *Atk.* 252. The plea should be signed, *Hodder vs. Watts*, 4 *Price*, 18. *Beames Plead.* 236, (*note a.*) It should deny all badges of fraud, *Goodrich vs. Pendleton*, 3 *Johns. Ch. Rep.* 384. A charge amounting to fraud is a charge of fraud. A charge of bad faith, is a charge of fraud; and the plea should deny the fraud, and all the circumstances amounting to fraud. *Beames Plead.* 34, 35, 236, 237. It is not stated in the plea, when or where the account was settled. The executor of a deceased copartner, might by conniving with a surviving copartner, so settle the accounts of the partnership, as to bring the deceased partner indebted to the firm, and by that means sink the whole estate of the deceased partner, and divide the profits between themselves. Whether or not any such object was in view, in this case, is of no sort of consequence. The act is not sanctioned by principle.

Wirt in reply. The only question in this case arises on the pleadings. Upon the coming in of the plea, the complainant should have amended his bill. No injury could arise from this mode of proceeding. That which is asked by the bill is for discovery and relief. If the plea is a bar to relief it is also a bar for a discovery. *Cooper's Plead.* 291. Is the matter pleaded a bar to the relief? A surviving partner may act as executor of his deceased partner. This is not denied; and if he can, why can he not settle the partnership concerns, and do what the deceased might have done? No settlement which the executor might make could benefit himself. He was always liable to be called on by a future administrator or the representatives of his intestate. While *King* was the executor of *Taggart* he was competant to give a discharge to any debtor, &c. No fraud is charged in the bill so as to affect the plea. The fraud to affect the plea must charge fraud in the settlement and the stated account. There is no more charged in this bill, than there is in all ordinary bills against the fairest characters in the community. If it is a bill for an account, then is the plea, an answer and bar to the account asked for. *Mitford*, 210, 211. The bill states that there had been no account settled, and calls for one. The plea in answer says that there was an account stated, &c. If the bill had charged an account settled by fraud, &c. Then the plea must have denied the fraud, &c. *Drew vs. Power*, 1 *Sch. & Lef.* 192. *Cooper's Plead.* 279. But here no fraud or error has been alleged to have taken place in the account stated. The plea is full to all essential parts. Why did not the complainant take issue on it, and put the defendant to his proof? The complainant might in a variety of ways have called for the account. But it is said that the plea must be good in whole; and that if it is bad in part, the whole is vitiated. *Mitford Plead.* 243. *Cooper's Plead.* 230.

Dorsey J. delivered the opinion of the court—To the plea of an account stated, filed by the appellant, various causes of demurrer, both general and special, were assigned by the appellee; and upon hearing, the plea was overruled by the Chancellor. To test the correctness of that decision the present appeal hath been prosecuted.

A preliminary question, however, presents itself for the consideration of this court, viz: is the decree or order, passed by the Chancellor in this case, of such a character, as to vest in the appellant an immediate right of appeal. That it does not, we think manifest, on reference to the principles established in the cases of *Snowden et al. vs. Dorsey et al.* 6 *Harr. and Johns.* 114, and *Thompson vs. M'Kim*, 6 *Harr. and Johns.* 302, and *Williamson vs. Carnan et al.* 1 *Gill* and *Johns.* 184, and *Hagthorp et al. vs. Neale, Adm'r of Hook*, 1 *Gill and Johns.* 270. It decides a mere question of pleading: it settles no right between the parties. "If the plea is overruled, the defendant may insist on the same matter by way of answer." *Mitf. Plead.* 248. The only conclusive effect of the decision then is, that it drives the party to the necessity of asserting the same defence in a different form of proceeding; the consequence of which is, that he is subjected to the expense of producing his testimony to substantiate the allegations, relied on as his discharge. The same expenditure, he must have incurred, had issue been taken on the plea; and for this expenditure, in contemplation of law, he is indemnified by way of costs, if successful on the trial. It is not a decretal order, which in the language of the court, in *Thompson vs. M'Kim*, "decides and settles the question of right between the parties," or, in that of *Williamson vs. Carnan et al.* which "so materially affects the rights and interest of the party, as to bring the case within the principle of *Thompson vs. M'Kim;*" but it is simply a decision, on a question of pleading, which leaves the whole matter in controversy open for future adjudication.

Waiving, however, the objection to the regularity of the appeal; the overruling of the plea meets our entire concurrence. It is wanting in form and defective in substance: it contains not even the common conclusion, repeating the matters relied on in bar of the suit and praying judgment of the court, whether the defendant ought to be compelled to make any further or other answer to the bill. The plea states, in bar of the relief and discovery prayed for, "that the defendant finally settled and adjusted with *John C. King*, executor of the estate of *Henry Taggart*, deceased, after the death of said *Taggart*, an account in writing; and by said account, the balance, in writing due to this defendant by the estate of said *Henry Taggart*, on the 25th day of October, in the year 1823, was admitted to be $38,341 16½." The particular time or place, when the alleged settlement took place, is not stated, and, for aught that is contained in the plea, it might have beem made in the *State of Maryland*, after the granting of letters of administration to the appellee, and even after the commencement of this suit. But suppose it be conceded that the time of accounting was on the 25th of October, 1823, will this cure all objection to the plea as regards time? unquestionably not. The bill charges the defendant with having collected (but says not when) after the death of *Henry Taggart*, a large amount or the whole of the debts, due to the firm of *Henry Taggart & Co.* amounting to $52,383 33; with having applied part of the personal property of *Henry Taggart*, enumerated in exhibits D and E, as of the value of $3260, to the payment of *Henry Taggart & Co's* debts; but says not at what time the application was made. The bill also charges that *Henry Taggart*, at his death, was sole owner of schooners *Centillo*, *Daphne* and *Cleopatra*, and one third of schooner *Leano*, and held a large interest in the Brig *El Presidente.* That all of said vessels were taken possession of and sold for the sum of $16,800; and the proceeds of sale applied to the defendants own use: but when the sales were made, and the proceeds received is not stated. That the Brig *Aquila*, owned by *Henry Taggart*, on her cruise between February and October, 1823, made many prizes, which were condemned and sold; and the proceeds, amounting to upwards of $10,000, received by the defendants and applied to their own use, but when received is not alleged. That in a subsequent cruise she made captures, the proceeds of which were received by *Danels*, and amounted to upwards of $30,000; and subsequently made prizes of great value, which were received in like manner. That *Henry Taggart*, at his death, owned one half of the *Brig El Vencedor*, the earnings of which, received by the defendant, *Danels*, had been $64,000, but when received does not appear. That individual debts, due *Henry Taggart*, at his death were collected by the defendants, and appropriated to their own use, to the amount of $57,440; of the time of receipt nothing is said. Admitting then, what the plea does not distinctly aver, (but what is indispensable to its validity) the time when the account was stated, the Chancellor could not have done otherwise than overrule the plea. It covers not the case set forth in the bill: every word of it may be true, and yet according to the allegations of the complainant, the defendant may have received, subsequently to the time of adjusting the account stated, and be now bound to account for, all the items hereinbefore enumerated, amounting to the sum of $234,483 33. It is therefore no bar to the discovery and relief sought for. The plea, of an account stated, to such a bill as the present, cannot be sustained unless it be supported by an answer denying the receipt of any part of the money for which he is called upon to account, subsequently to the time when the account stated was adjusted. But relieved from this objection the plea is yet void for uncertainty. It alleges that the defendant *Danels*, settled and adjusted with *John C. King*, *executor of Henry Taggart*, "an account in writing;" but what transactions it embraced: whether it related to all or any of the subject matters, now in controversy, we are furnished not with even the means of conjecture. For aught that appears it may have been an account settled between the parties of the partnership concerns of *Taggart and Danels*, anterior to the admission of *John C. King* into the firm; or it may have been a settlement of transactions wholly unconnected with all or any of the claims of which the defendants are now called on to answer. Upon such a plea the plaintiff could not have taken issue. By doing so he would have admitted the sufficiency of the plea as a bar, if the facts which it asserted were established by proof. And if on such an issue the account stated had been proved, although it might relate to matters wholly foreign to those now in controversy, the bar would have been complete and the bill must have been dismissed.

"In pleading, (says *Mitf. Plead.* 237,) there must be the same strictness in equity, as at law ; at least in matter of substance." "A plea must follow the bill and not evade it." *Mitf. Plead.* 237. "All the facts necessary to render the plea a complete equitable bar to the case made by the bill, so far as the plea extends, that the plaintiff may take issue upon it, must be clearly and distinctly averred." *Mitf. Plead.* 240. The same doctrine is found in *Harr. Ch.* 229, and *Cooper's Plead.* 228. Apply these principles to the plea before us, and all doubt of its insufficiency must instantly vanish. Its defects are equally obvious, by comparing it with the precedent of a plea, of an account stated to be found in *Harr. Ch.* 618.

The plea, professes to be a bar to all the relief and discovery called for by the bill, a part of which refers to specific property of the late *Henry Taggart*, now in the possession and user of the defendant *Danels*, to such part of the complainant's prayer, the plea of an account stated, cannot be urged as a bar.

APPEAL DISMISSED WITH COSTS.

COALE, *et ux.* *vs.* BARNEY, *et ux.*—December, 1829.

Upon a merely equitable estate, no writ of partition can be maintained at law.

A failure to comply with an engagement to do a mere nugatory act, ought not to impair the rights of a complainant in equity to relief, when the facts of his case, otherwise concur, to sustain his bill.

An agreement was entered into, on the 27th November, 1813, between the *cestui que trusts* for life, and remainder in fee, and the trustee, of a certain trust estate, held by the latter in fee, the object of which was to lease out

the trust property then unimproved, aud secure to the *cestui que trusts* in remainder, an immediate participation in the rents. For that purpose it was agreed, that the trustee should appoint an agent, to make leases for ninety-nine years, with liberty of renewal, *for such rents as should be thought reasonable by the parties interested*, payable annually during the terms, to the agent in trust, as follows :—viz. one half to one *c. q. t.*, in remainder, during her life; and after her death, to her children, their *executors and administrators;* one fourth to another *c. q. t.*, in remainder for life, with a similar reservation to her children, &c. The other fourth, to the *c. q. t.* for life, during her life, and after her death to the last above mentioned *c. q. t.* in remainder, her *executors and administrators.* On the 29th September, 1823, a bill was filed by two of the *c. q. t.*, against the third, for a specific execution of the agreement, upon the ground that the defendant, since the year 1818, had prevented the execution of the leases, and refused to do any act, towards carrying the contract into effect. This charge being established, and it appearing that the parties were near relations, and that the complainants had made frequent efforts for an amicable arrangement, IT WAS HELD, that there was an adequate consideration to support this agreement, for the violation of which damages to the full extent of the injury sustained, might be recovered; that the complainants had not slept upon their rights in such a way, as to shew the contract had been abandoned ; that Chancery has power to grant adequate relief, which could only be done by providing the means, necessary to carry into effect the leading object of the parties, the leasing the property at reasonable rents ; and that in doing this, it was the duty of the court, to gratify the minor provisions of the agreement, so far as it could be done consistently, with the accomplishment of the grand design.

The defendant, in this case, was deemed to have forfeited the right of fixing the reasonableness of the rents, to be reserved in the leases referred to in the preceding contract, by shewing her determination to act in such a way, as to render her exercise of that right wholly inconsistent with the relief due to the complainants, and her right was therefore transferred to a trustee appointed for the purpose of executing the agreement ; which trustee was enjoined to execute leases, for such rents, as he, together with the complainants, should think reasonable.

Where an agreement contains provisions, which, by reason of some technical principle of law, cannot be carried into effect, according to its literal import, it is the duty of a court of equity, for the sake of the intent, to give it that construction which the rules of law will tolerate; and the intention of the parties, to be collected from the whole instrument, will justify.

So the interests of the *cestui que trusts,* in remainder, in the property referred to in the preceding agreement being real, and not personal estate, and as such, could not be limited to their *executors and administrators.* The court decreed the rent to be paid to the *c. q. t.* and their *heirs,* and this as to all the parties entitled to such rents.

APPEAL from the Court of Chancery. The bill, which was filed on the 29th of September, 1823, by the appellees against the appellants, and *Hannah Kitty Chase*, stated that *John Eager Howard*, by his deed of conveyance, bearing date the 28th February, 1793, did convey to *William Paca*, a certain lot of ground, situate in the city of *Baltimore*, upon the terms and conditions of the exhibit A, hereinafter set forth. That after the execution of the said deed, and in the life time of *Samuel Chase*, his daughter *Eliza Chase* intermarried with *George Dugan* and *Mary Chase*, the female complainant intermarried with *William B. Barney*, the other complainant. After which, *Samuel Chase* died, and on the 2d of October, 1813, *George Dugan* died intestate, and without issue of the body of his wife *Eliza*. That *Eliza*, his widow, acquired in her right as his wife, a large amount of property, which placed her in very comfortable, if not affluent, circumstances. That *Mary*, the female complainant, having several children, and being in straitened circumstances, owing to the misfortunes of her husband in commerce, the said *Eliza* and *Hannah Kitty Chase*, the mother of *Eliza* and *Mary*, being desirous of bringing the said property into immediate action and use, and for the benefit of all parties interested in the same, which would otherwise have remained useless, both to *Eliza* and *Mary*, during the life of their mother, did, together with *John P. Paca*, the son and heir of *William Paca*, and to whom the trust aforesaid had descended by the death of his father, and with the complainants, execute an instrument of writing, whereby they agreed and covenanted to and with each other respectively, according to the terms of the exhibit B, hereinafter set forth, a copy of which was filed with the bill, and the original of which was to be produced when required. That *Eliza Dugan*, about the 29th of January, 1818, intermarried with *Skipwith H. Coale*, and she has since wholly refused to do any act whatever, towards carrying into effect, the agreement and covenant aforesaid, and hath actually notified *John P. Paca*, and all the other parties interested, that she will never consent that the same shall be carried into effect. That in consequence of such, her refusal to comply with her said agreement, such persons as are desirous of taking leases upon the said lot of ground, have been and still are deterred from doing so; and *John P. Paca* being but a trustee, and knowing that *Eliza* is in justice and equity bound to fulfil her agreement and covenant, is yet unwilling to incur the hazard which he apprehends from executing the power of attorney aforesaid. That by the bad faith and refusal of *Eliza*, the complainants are greatly damnified, and scarce possess the means of providing for the subsistence, much less for the education of the children of *Mary*. That she and her sister *Eliza* were educated and entered life together, and *Eliza*, at the time of executing the said contract, and until her last intermarriage, was altogether childless; while *Mary*, who is the youngest sister, was the mother of several children, and hath since had several others, for whose maintenance and education, tenderness and duty alike have always heretofore, and now doubly prompt her to provide. The bill had a general interrogatory, and also a special one as to *Eliza's* conduct, and whether she did not execute the aforesaid agreement in manner and form, and under the circumstances aforesaid, and prays that *Eliza* may be compelled to do all such acts in the law as may be necessary specifically to put into execution her contract or agreement aforesaid, according to its true intent and meaning, &c. The bill also prays for all relief proper in the premises.

The *Exhibit A*, is a deed from *John Eager Howard* to *William Paca*, dated the 28th of February, 1793, whereby in consideration of the sum of five shillings, the said *Howard* conveyed to the said *Paca*, his heirs and assigns forever, all that part of a parcel of a tract of land called *Lunn's Lot*, beginning for the said part at, &c. containing 2 1-8 acres of land. To have and to hold the following part of the said parcel of land beginning, &c. containing one half acre and one thirty-second part of an acre of land, unto the said *Paca*, his heirs and assigns forever, in trust to and for the uses, &c. that is to say: In trust for the use and behoof of *Samuel Chase* and *Hannah Kitty Chase* (wife of the said *Samuel Chase*) for and during their joint natural lives, and the life of the survivor of them; and after the death of the said *Samuel* and *Hannah Kitty*, to have and to hold one undivided moiety or half part of the said land and premises, in trust for the use and behoof of *Eliza Chase*, daughter of the said *Samuel* and *Hannah Kitty*, and the heirs of the body of the said *Eliza Chase*, and to have and to hold the other undivided moiety or half part of the said land and premises, in trust for the use and behoof of *Mary Chase*, daughter of the said *Samuel* and *Hannah Kitty*,and the heirs of the body of the said *Mary Chase;* and in case of the death of either *Eliza* or *Mary* without issue, cross remainders between them in tail, and with remainders over to *Samuel* and *Thomas Chase* (sons of the first mentioned *Samuel*) in distinct halves in tail, with cross remainders in tail between them; and with final remainders to *Ann Chase* (daughter of the said *Samuel*) as to one half, and to her heirs in fee simple; and, as to the other half, to *Matilda Ridgely* (another daughter of the siad *Samuel*) in like manner. To have and to hold all the residue of the said part of the parcel of land, first above mentioned and described unto the said *Paca*, his heirs and assigns forever, in trust to and for the several and same uses, intents and purposes before mentioned, of and concerning the part of the said parcel of land last above mentioned; and on the further trust, &c.

The *Exhibit B*, is an agreement entered into on the 27th of November, 1813, between *John P. Paca*, *Hannah Kitty Chase*, *Eliza Dugan*, *William B. Barney* and *Mary* his wife, reciting that "*John P. Paca* is at this time seized in fee simple, in trust for the said *Hannah Kitty Chase*, *Eliza Dugan* and *Mary Barney*, of and in a certain piece or parcel of ground, in the city of *Baltimore*, fronting on *Lexington street*, the breadth of 175 feet, and on *Eutaw street*, 186 feet, and binding westwardly on *Walshes alley*, and on the south with an alley called *Chases alley*, which piece or parcel of ground is at present unimproved. And whereas, it is thought by the parties interested, that it would be for their mutual benefit, that the said property should be divided into lots, and demised for ninety-nine years, with liberty of renewal, for such rents as may be thought reasonable by the parties interested, to be reserved by the said leases, payable annually during the said terms. And whereas, by reason of the distance of the said *John P. Paca's* residence, from this city, it would be inconvenient for him to execute the said leases, and to attend to the collection of the said rents, now, therefore, these articles witnesseth, that the above mentioned *John P. Paca*, *Hannah Kitty Chase*, *Eliza Dugan* and *William B. Barney* and *Mary* his wife, have mutually and separately for themselves, their heirs, executors and administrators, agreed and covenanted, to and with each other, respectively, and to and with their respective executors and administrators, that the said *John P. Paca* shall, and will, by a good and sufficient power of attorney, by him duly executed, constitute and appoint *Cumberland Dugan*, of the city of *Baltimore*, his attorney, for the purpose of executing such leases, and giving thereby full power and authority so to do. In which leases, the rents shall be reserved to be paid to the said *Cumberland Dugan*, his executors or administrators, in trust for the said *Hannah Kitty Chase*, *Eliza Dugan* and *Mary Barney*, in the following proportions: In trust as to one half of all such rents to be paid to the said *Mary Barney's* sole and separate use, during her life, annually, to her, and after her death to be paid to her children, their executors or administrators, in equal shares; to be discharged, during her life time, by her receipt," &c. And as to one fourth part of the said rent, in trust to be paid to the said *Eliza Dugan*, her executors and administrators. And as to the other fourth part, in trust to be paid to the said *Hannah Kitty Chase*, during her life, and after her death, to the said *Eliza Dugan*, her executors," &c. Signed and sealed by all the said parties.

The only answers material, were those of *Coale* and wife. They answered separately. *Coale* answers as to his hearsay and belief, that *Mrs. Chase* had not performed the consideration, on which the said agreement was founded,—that of barring the entail of the said lot or parcel of ground, by uniting in a conveyance; that she had made leases of the ground in question; that *Barney* and wife had mortgaged their estate in it, and that the agreement had been abandoned. *Mrs. Coale* in her answer alleges, that her mother agreed, but now refuses to unite with the other persons having the remainder in tail, to bar the entail, which was the consideration of the agreement of leasing. That the agreement, except upon that consideration, was without inducement or consideration at all. That she had notified her opposition to the leases of the property, because her mother had violated the understanding on which the agreement was entered into. That she has children now, and that she offered to let the agreement be executed, if she should be allowed one half of the three-fourths of the rents.

The complainants and defendants counsel on these answers coming in, ordered the register "to file the general replication," and to issue a commission to a person named by them. An agreement was entered into, to set the cause down for hearing at December term, 1825, with liberty to either party to examine witnesses under a commission.

Bland, Chancellor, (December term, 1825.) It appears from the proceedings, that the articles of agreement mentioned in the bill of complaint, bearing date on the 27th of November, 1813, ought to be specifically performed and executed, according to the true intent and meaning thereof, as prayed.—*Decreed*, that *Cumberland Dugan* be, and he is hereby constituted and appointed a trustee for the purpose of executing and performing the said agreement; and the said trustee, shall immediately proceed to make such a lease or leasses, of the piece or parcel of ground described in the said articles of agreement, in such manner and upon such terms as he shall deem most advantageous and beneficial to all the parties concerned and interested in the same. In which lease or leases the rents shall be reserved, and made payable unto the said trustee, his heirs and assigns, in trust for the said *Hannah Kitty Chase*, *Eliza Coale*, and *Mary Barney* in the following manner, to wit. In trust, as to one half of all such rents, to be paid to the said *Mary Barney's* sole and separate use, during her life annually to her, and after her death to be paid to her children, their executors or administrators, in equal shares; to be discharged during her life time by her receipt, &c. And as to one fourth of the said rent, in trust, to be paid to the said *Eliza Coale*, her executors and administrators. And as to the other fourth part, in trust, to be paid to the said *Hannah Kitty Chase* during her life, and after her death to the said *Eliza Coale*, her executors, &c. *Decreed* also, that *Coale* and wife pay all the costs of this suit. From this decree, *Coale* and wife appealed to this court.

The cause was argued before EARLE, MARTIN and DORSEY, J.

Mayer, for the appellants, insisted. 1. That the agreement for leasing the property was inoperative, and could not be regarded by a court of equity. 2. That the bill, answers and proceedings, do not present a case fit for the cognizance or specific interposition of Chancery. 3. That it was the duty of the complainants to allege the equitable merits of their claim—leaving no doubt of those merits. 4. That the bill shows no equitable right; and the answers of the appellants, rebut all pretensions of the bill. 5. That upon the bill, answers and proceedings, the decree was erroneous.

1. The answer of the defendant *Mrs. Coale*, is strictly responsive to the bill; and although there is a general replication, and no testimony taken, yet it was incumbent on the complainants to prove their case. The case must be considered on the bill and answers. The complainants must satisfy the court, that the agreement to be enforced is liable to no suspicion, and equitably fit to be carried into effect. 2 *Pow. on Cont.* 222. *Seymour vs. Delancey*, 6 *John. Ch. Rep.* 222. 1 *Madd. Chan.* 321.

2. The agreement cannot be enforced. It depended on the discretion of *Mrs. Coale*, whether she would carry it into effect, or not. Equity can have no cognizance of it. The agreement gave *Paca* no more authority than he before possessed. He had no power to lease. For the non-fulfilment of the agreement none but nominal damages were sustained. Voluntary covenants are not to be enforced in equity, 1 *Madd. Chan.* 321, 327, 328. *Minturn vs. Seymour*, 4 *Johns. Ch. Rep.* 497. Nor

in any case, where none but nominal damages can be recovered at law. 1 *Madd. Chan.* 288, 321, 328. *Stapilton vs. Stapilton*, 1 *Atk.* 10. Here only nominal damages would be recovered for refusing to permit *Dugan* to be appointed an attorney to make the leases. It was only a covenant for the delegation of a power. How could a decree be made to enforce the agreement? It is true, the Chancellor has passed one, constituting *Dugan* the attorney to execute the leases; but it is wholly inequitable. *Mrs. Barney* is one of the complainants. She makes no concession, and has no right to call for the execution of the agreement.

3. But there has been laches fatal to the complainants' case. The agreement was entered into in 1813, and the bill was filed in 1823. Specific performance will, therefore, be refused. 1 *Madd. Ch.* 239, 330. *Marquis of Hertford vs. Boore*, 5 *Ves.* 720 (*note* 6.) *Guest vs. Homfray*, *Ib.* 818, 822.

4. There is no allegation in the bill that the property could be leased upon advantageous terms.

5. The answer of *Mrs. Coale* is separate from that of her husband. Husband and wife must answer jointly. *Cooper's Plead.* 24, 30.

Winchester, for the appellees. The whole of what has been urged, by the counsel of the appellants might be admitted, as having nothing to do with the case before the court. The defendants who resisted this proceeding, must sustain their case by proof in support of their answers. The answers are not responsive to the bill. The agreement is a common one to change the situation of the title to the property. It is a contract for a valuable consideration. The interest in the property was in *Mrs. Chase* during her life; and she and her daughters with a full knowledge of the subject, executed the agreement. There is no remedy for enforcing it, unless it can be enforced in equity. The court of chancery can enforce this contract. 1 *Madd. Ch.* 286. If the allegations in *Mrs. Coale's* answer, were all proved, yet they have nothing to do with the claim set up by *Mrs. Barney*, to have the agreement carried into effect. But there is no proof of any of the allegations in the answer of *Mrs. Coale.* The agreement is admitted—there is no suspicion of its improper execution.

But it is urged that the complainants have sustained no damage, or if any, only nominal damages. Suppose at law, it was proved that the property could have been leased for $1,500 or $2,000, but for the objection of *Mrs. Coale* to execute the agreement, would *Mrs. Barney* be turned off with nominal damages. It is also alleged that there is no equity set forth in the bill. This is never done where it is for a specific execution of a contract, as the contract is to speak for itself. The non-execution of the contract is shown by *Mrs. Coale* in her answer, shewing, that she prevented its execution. It is admitted that voluntary covenants or contracts are not enforced in equity; but it is denied that this is a voluntary contract within the meaning of, 1 *Madd. Chan.* 321, 327.

It has been said that the complainants have been guilty of laches. This must depend upon all the circumstances of the case, and the connexion of the parties to each other.—Here were sisters, who no doubt, were not desirous of going to law, It is not similar to the ordinary cases, of persons wholly unconnected by relationship. It is not a contract of purchase and sale; but it is a family compact in which all had a right to move. Forbearance, therefore, was a duty, and it was meritorious. *Mrs. Coale*, in her answer, shows that the subject was constantly a source of correspondence between her and her sister, &c. and that a new agreement was at one time in agitation.

Taney, (Attorney General) and *Mayer* in reply.

1. The court will observe that the real estate in question in the cause stands conveyed to *Mrs. Chase* for life, with remainder as to one moiety to *Mrs. Coale*, the appellant, in tail general, and as to the other moiety to *Mrs. Barney*, the appellee, also in tail general. The leases contemplated by the agreement, which is sought to be enforced, reserve one fourth of the rents to *Mrs. Chase* for life, another fourth to *Mrs. Coale*, and

"*her executors and administrators*," and the remaining half to *Mrs. Barney* for life, and to her children, and their executors and administrators after her death, and reserving further to *Mrs. Coale* and her "*executors and administrators*," after *Mrs. Chase's* death, the part of the rents secured to *Mrs. Chase.* The result of this prescribed reservation of rents is, that *Mrs. Coale* has only a life estate in the rent assigned to her, and that after her and *Mrs. Chase's* deaths, the rents as to one half, will *entirely cease*, neither accruing to the children of *Mrs. Coale* as her heirs, nor devolving upon *Mrs. Barney* or her children, by force of any constructive limitation, and the tenant will enjoy half of the ground free of rent. *Co. Litt.* 47 a. 2 *Roll. Abr.* 289, 450. *Dyer* 45. 12 *Co.* 35. *Cro. Car.* 290. This is manifestly a most unreasonable stipulation, and so glaringly unjust to *Mrs. Coale and her children*, that we presume the court will not effectuate an agreement, that involves such *a forfeiture of prior admitted rights.* If *Mrs. Coale* had an estate tail general in the land, the rents in all fairness ought to be co-extensive with such an interest, and any retrenchment, *especially one which injures her without benefiting the other parties*, must be pronounced inequitable in the agreement under consideration. We are told, that "every agreement to merit the interposition of a court of equity in its favor, must be fair, just, reasonable, bona fide, certain in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary." 2 *Powell Contr.* 221. 3 *Ves.* 420. 4 *Ves.* 480. 9 *Ves.* 608. Now, regarding the ineffectual reservation of rent as to *Mrs. Coale*, if this agreement be tested by the rule we have stated, it will be found without any of the equitable qualities, that agreements must have to be countenanced by this court and specifically enforced. Can it be said to be "*fair, just and reasonable*," that *Mrs. Coale* and her children should be thus cut off from the substance, of nearly her whole estate in this land? If not—where, looking to the other elements of the rule, can it be shown that the agreement in this respect, is "mutual," or has a good, and valuable consideration? Can it be urged that the enjoyment of one fourth of the rent for her mother's life, is any equivalent for the privation of valuable estate in tail general, and *the disinheritance of her children?* The suggestion will not bear an argument.—By all the principles then that govern the jurisdiction of the court in such cases of specific performance, this agreement cannot be sustained and carried into effect according to its terms, and the court must consequently repudiate it unless they have some power paramount to the literal terms of the writing, by which they may give it effect without doing the injustice we have spoken of. Have the court this power of substituting phraseology, and decreeing, as if the agreement reserved the rent conformably to the estate—*to Mrs. Coale and her heirs?*

We are told that courts of equity can no more *make* contracts for men than courts of law. Lord *Mansfield*, *Hotham vs. East India Company*, *Doug.* 277. The construction of a contract is all that courts of Law, or even of equity ever pretended to;—not the formation of contracts. Courts of Equity, acting as to the *form* and *mode* of giving effect to contracts may be supposed to have gone the length of even devising new contracts, so as to bring into operation the so called spirit of the contract. But it will be found, that the contract in its prescribed boundaries is the text which they respect, and although courts of equity assume a discretion as to the mode and form of assuring the benefit of the contract, the sphere of that benefit is always *the express and defined scope of the contract itself.* It is true that courts of Equity in regard to *charitable uses*, exercise a sort of controling discretion, and execute the *general* intention of the party, as denoted, without any regard to limitations or any of his *specific views*, where the statute opposes them. But this power is given by the statute of charitable uses, or derived from it, at least, by construction. At common law, no such power is asserted in any judicature. The *cy-pres* preformance of conditions, for instance, does not presume to transcend the *express limitations*—but the doctrine simply requires that so much of the assigned condition as can, shall be fulfilled—but it sanctions no constructive equivalent—no discretional substitution. The most obvious and noted instances of the seeming departure of courts of Equity, from the terms of contracts in dictating specific performance, are cases of marriage settlement. 1 *Newl. Cont. Ch.* 19. *Pow. Con.* 40. But on examination it will be found, that the courts do not there enlarge or contract the scope of the benefit *as declared and defined* by the contract—or increase or diminish the persons or objects to be benefited, as explicitly set forth by the contract itself. Thus where there is an agreement in consideration of marriage, to settle an estate on the husband and the heirs of his body from the marriage, a Court of Chancery very properly esteem the children of the marriage within the marriage consideration, and included in the "heirs of the body," and, inferring that those heirs are to be benefited, (*just as the common law in all estates tail infers*,) an agreement of such a tenor, is executed in Chancery by a strict settlement on the husband, and his sons and the heirs of the body of such sons. But here, and so in all the instances in the books, the court acts within the range of the expressed contract; its test being that it shall have no occasion to superadd any thing to the contract in order to consummate it;—and adopting the safe principle, that the court shall not take upon itself the *sentiments*, and identify itself with the *situation* of the party, but interpret his views as his words denote and limit them in his contract—when all fair equitable circumstances concur to incite it to act at all.

Courts of equity have the same principles that Courts of law acknowledge in defining and circumscribing their discretional power; but acknowledge the actual convention of the parties as the only subject of their consideration, and its declared scope, therefore, as marking out the latitude of their discretion. And without the principles which have been asserted, no such thing as a defined contract can exist, and judicial power will supersede all private right, and judicial discretion be desultory and boundless. Now, if the agreement in question in this cause were silent as to the appropriation of rents, equity, according to common law itself, would give them to the holders of the estate. But here the terms of the leases in this particular are unequivocally limited—and no other appropriation can be made that will not contradict the express reservation. *Expressio unius est exclusio alterius.* The conclusion, therefore, must be that the court cannot add, or interpolate, any words to give the contract a just and legitimate effect; and, unable to execute it as it exists with all the inequitable consequences it now involves, they will leave it, to avail as it may at common law.

2. There is another circumstance which appears to us conclusive against the interference of the court for the specific performance of this contract. The citations we have made show that a contract, to be entitled to specific performance, must be *mutual*—all parties must be bound to perform it.—To use lord *Eldon's* words, 2 *Powell*, 232, 234. 4 *Ves.* 849, "*all* parties must be bound, or none."—Now, how stands this point of reciprocal co-equal obligation in regard to the present agreement? The agreement is between *Mrs. Chase—Mrs. Barney and her husband*—and *Mrs. Coale*, while a widow. Will it be said that *Mrs. Coale* could legally, or even equitably, enforce this contract against *Mrs. Barney, whose proper estate was the subject of her* (*Mrs. B's*) *engagement?* It is the *legal* liability that is the test of the proper mutuality; but at all events, equity follows the law in the case of a married woman's agreement, who has no *special disposing power* given her under which she may make it. Besides, too, where no damages are recoverable at law on a contract, equity will not enforce it—and upon that principle alone, then, the contract could not be enforced in equity against *Barney* and wife. 2 *Powell*, 242, 252.

It may be said that this latter principle is too generally stated—but it will be found substantially correct. The only exceptions to the rule in its literal scope, being where the inability to recover on the contract at law, arises from want of form in the contract,—or where the relation between the party claiming and the party liable makes a suit technically impracticable, as in case of husband and wife. 2 *Powell*, 17.

Here there is a manifest want of the mutuality which is an essential property of all contracts that may be specifically enforced in equity. With that, too, falls all idea of a due *consideration* for the agreement. If *Mrs. Barney* could not be compelled to execute the contract, how oppressively unequal is *Mrs. Coale's* situation, if she is to be held liable;—and where then is the consideration for her being so? *Mrs. Barney* and *Mrs. Coale* held together the estate in the land, equivalent to a fee simple—and without *Mrs. Barney's* estate being brought into action, the agreement would be entirely inoperative. There is no ground to say, and can be no pretence, that *Mrs. Barney* had any peculiar disposing power over this estate beyond that which a *feme covert* has over any estate which she may have owned before marriage. This property was not even settled to her "*separate use*," in terms or effect;—which is necessary to make it equitably her separate property—that is: so as to give her any right to deal with it as if she were a *feme sole.* But in regard to *real estate* even thus made separate property, a power must be expressly reserved to the wife of disposing of it as a *feme sole*, else she has no special privilege in that respect. Now in this case, *Mrs. Barney* had before her marriage a trust estate in tail general—of which she had no more right to dispose, except by *deed* with her husband and upon private examination, than if it were her legal as well as equitable estate. It is established that equity recognises no distinction between trust and legal estates in land in reference to *femes covert* or tenants in tail, or in any respect whatsoever where no special power of appointing is given by the assurance to the wife, or there be not some express and unequivocal stipulation to make the case an exception. *If Mr. Dugan had made leases under the agreement they would have had no validity as to Mrs. Barney's interest, she being committed in them only by her agreement. If such would have been the case under the agreement, is there any ground for complaint that Mr. Dugan did not proceed to make these futile leases? and where then is the mutuality and consideration in reference to Mrs. Coale?* And it may be asked, if the *agreement* would have authorised no valid leases as regards *Mrs. Barney's* interest, how can the decree of Chancery produce such effect, resting as it does on the efficacy of the contract alone, which, in the particular of *Mrs. Barney's* interest, is intrinsically nugatory.

3. There must be great difficulty in framing a decree to carry this agreement into effect. Indeed no decree, consistent-

ly with the agreement, *can* pass, that shall be absolutely *compulsive* against *Mrs. Coale's* interest, *or paramount to her and her husband's private judgment*, as to the expediency and acceptance of the leases that may be proposed. The agreement refers to leases that reserves "*such rents as may be thought reasonable by the parties interested.*" There is no doubt that Courts of Law and of Equity may judge of the reasonableness of considerations—but in no case can they exercise that authority where the "*point of reasonableness is expressly referred to the judgment of the individual, and especially the interested individual.*" If the stipulation had been simply that "*reasonable rents*" should be reserved, the court might, no doubt, have determined the reasonableness. But that is not the stipulation in this instance.—And here the court, if they act at all on this agreement, must not only take from the party the right of judging the reasonableness of the rents, *but, not even themselves exercising it, they must delegate it to a stranger—and make his judgment the imperative rule of our private interests.* The case, in this its essential aspect, involves grave and momentous considerations which, *touching the high and sacred rights of individual property*, must be obvious to the court, and will, we are assured, induce them to pause on the question of their jurisdiction—and however *in the abstract* they may deem that *the parties* ought to execute the agreement specifically, they will, and must, consider as a point of solemn interest how far they can, within their legitimate province, devise a mode of *adversely* executing it—and how far they may set aside the right of the individual's discretion, which is reserved in the contract as part of that disposing power of her property, consecrated by the Constitution and the first principles of natural justice.

Dorsey, J. delivered the opinion of the court. Against any decree for the specific execution of the agreement mentioned in the proceedings in this cause, many distinct and independent grounds have been relied on, by the solicitors for the appellants. First, it was contended that the refusal of *Hannah Kitty Chase*, as alleged in the answer of *Eliza Coale*, to perform her promise of uniting for the purpose of docking the estate tail; (which promise, it is said was the main inducement with *Eliza Coale*, to enter into the contract,) is sufficient to induce the court to withhold that relief which it might otherwise have been disposed to grant. Without deciding the question so warmly contested in the argument; whether the answer, without further proof, can sustain a defence thus founded on new, and as it were independent matter, (which it unquestionably could not, unaided by the unsafe and unusually comprehensive interrogatory in the conclusion of the bill of complaint,) it is sufficient to say, that this ground of resistance, is swept from the appellants, by the decision of this court in the case of *Newton, et al. vs. Griffith, et al.* 1. *Harr. & Gill*, 111, which determines that estates tail, to the heirs of the body generally, created after the first of January, 1788, are, by the operation of the act of descents, converted into estates in fee simple absolute. And this case cannot evade the rule thus established by the fact, that in *Newton and Griffith*, the question arose on the legal title to land, here the principle is to be applied to an equitable interest. In this respect equity must follow the law. The alleged promise of *Hannah Kitty Chase*, to unite in docking the entail, was therefore an engagement to do a nugatory act; her failure, to comply with which, ought not to impair the rights of the appellees.

It can hardly be necessary to notice one of the objections relied on: that a Court of Chancery cannot enforce the contract against *Eliza Coale*, because it was wholly voluntary on her part; as she was to receive no consideration for her agreement to lease. If it be "no consideration" that the mother, a tenant for life, transfer one half her interest to her daughter, in property to which the daughter was entitled in remainder, to obtain the daughter's assent to such an improvement of the property, as would (for aught that appears in the record) produce inconvenience or loss to no person interested; but was indispensable to any beneficial enjoyment of it by the mother; it is difficult to conceive, what, in such a case, would be required, as an adequate consideration.

We are told by the appellants solicitor, that the great depreciation in real property, and especially in the city of *Baltimore*, is matter of public history, of which the court must judicially take notice, and that, although a regard to her own interest, might prompt *Eliza Coale* to agree to lease in 1813: yet the state of things is now entirely changed, and to enforce the agreement at this time, would be subjecting her to great hardship and loss. The condition of this country, in 1813, and a few years afterwards, was an accidental and unnatural one; the like may not again occur for centuries, and it is matter of sheer speculation and great doubt, whether the interest of all concerned would not be promoted by an immediate leasing of the property. But if there be hardship and loss in the case, to whom is it to be imputed? To *Eliza Coale*, whose refusal to perform her agreement, prevented the execution of leases, when rents had reached their most unreasonable height. Had she not thus refused, from that transfer by her mother, which is now called "no consideration," she would have received in rents, up to this time, a sum of money, greater in amount, than the entire value of her present interest in the property: and, independently of rents received, her interest in the property would now have been four times as valuable as it is. In this she is not the only sufferer. But the consequences of this controversy are now visited, in a much higher degree upon her sister, *Mrs. Barney*.

It was also urged, that by another rule of chancery jurisdiction, the appellees were prevented from obtaining the interposition of a Court of Equity: viz. that where a party had a complete remedy at law, (as might here be had by a writ *de partitione facienda:*) or where nominal damages only could be recovered at law, a specific execution of the contract will never be decreed. In answer to this it may be replied, that the rule referred to has no application to the case before us. It does not appear that the lot of ground is susceptible of a division into moieties; and if it were, even if no life estate intervened, the estate of the appellees being merely equitable, no writ of partition could be sustained at law. That if it could, the condition of the parties, under such a proceeding, would be different from what it would be under the agreement. If partition were made at law, 'tis true, that *Barney and wife*, with *Hannah Kitty Chase*, might (as is stated) lease a moiety of the ground, for ninety-nine years, renewable forever, reserving the rent to *Mary Barney* and her heirs; but, *non constat*, that she would be willing to do so. She might with convenience assent to giving her daughters three-fourths of the rents, reserving her life estate in the remaining fourth: yet it by no means follows, that she could conveniently bestow upon one daughter the entire rents of one half of the property; whilst the other half, in its unimproved condition, continued on her hands destitute of value. That so far from nominal damages only, being recoverable, for such a violation of contract, damages to the full extent of the injury sustained by the appellees, would certainly be recovered.

Another ground more strongly relied upon against the appellees is, that they have slept upon their rights, in such a way as to shew that the contract was abandoned. And many cases have been referred to, between vendors and vendees of real estate, in which a Court of Chancery has denied all aid to those, who have not been vigilant and active in asserting their rights; or, in the language of some of the cases, who have not been always "ready, desirous, prompt and eager," to comply with their portion of the contract, and to enforce on the other party, a like compliance with its stipulations. A contract to lease, say they, is to all beneficial purposes a sale; its effects being the same. This position would not be denied, if this controversy were between a lessor and lessee; nor would the conclusiveness of the authorities cited be questioned, if this were a case between vendor and vendee. The justice, the policy of this rule is most obvious; the grossest frauds and injustice would be practised, if it did not prevail. But for this, stale contracts virtually abandoned, though not formally released; in case of a sudden rise or fall in the value of the thing contracted for, would be set up, and the party complainant would unfairly gain what the party defendant would unjustly lose: an amount precisely equal, to the appreciation or depreciation which the property had undergone; could that, in any event, be the predicament of the parties to this suit? Certainly not. As regards enhancement or diminution of price, their interests are homogeneous, inseparable; profit or loss can happen to neither, without a proportionate participation by both. Except in the class of cases adverted to, no authority has been produced to shew that for such laches and under such circumstances, as are before us, relief has been denied under the presumption of a waiver or abandonment of the contract. The delay of the appellees, in proceeding to assert their rights, is considerable; but it is satisfactorily accounted for, and the weight of the objection entirely fails when we reflect on the near relationship of the parties concerned, and look to the answer of *Eliza Coale*, and see what efforts were made to effect an amicable arrangement of the dispute, and that the door of negociation is still open, and that this implied abandonment of contract is no where insisted on in the answer.

The answer does not state, nor has any proof been offered to shew, that the consummation of this agreement will work any particular hardship upon the appellants, or subject them to loss, inconvenience or sacrifice of any description. Why then, these appellants should persist in a course of conduct, by which they have already lost in rents, more than the value of their whole interest in the property, is inconceivable. The hardship of the case lies altogether on the other side. A large lot of ground, as is stated in the agreement, lying "in the city of Baltimore" "unimproved:" owned by a mother for her life, with remainder in moieties to her two daughters in fee, is kept in a situation to be of no annual value to any of them, by the refusal of one of the daughters to permit its improvement in the usual and only practicable mode; when by complying with the solemn contract into which she has entered, she would relieve the wants of a needy sister and family, for whom she professes great affection and concern; and be herself invested with the immediate enjoyment of one half of that, to which she was only entitled in remainder; and this too, without lessening her interest in her other moiety.

The last ground, upon which a reversal of the decree was demanded, was; that it was erroneous, inasmuch as it departed from the sense and terms of the agreement, in investing *Dugan*, the trustee, with the privilege of judging of the reasonableness of the rent: a privilege reserved to *Eliza Coale*, as one of the persons interested.

That this court have the power to grant adequate relief, in a case like the present, we have no doubt. Such relief can only be had, by providing the means necessary to carry into effect, the great leading object of the parties; the leasing the property at reasonable rents: and in doing this, it is our duty to gratify the minor provisions of the agreement, as far as it can be done, consistently with the accomplishment of the grand design. To pass a decree, as is suggested, that leases should be made at such rents as *Eliza Coale* should sanction, would be doing a nugatory act. She has, by her conduct in this transaction, shewn a fixed determination that no leases shall be made, if she can prevent them: unless at a sacrifice, of the interests of her mother and sister, which she is not warranted in demanding. She has therefore forfeited this right, by acting, and shewing a determination to act, in such a way, as to render her exercise of it wholly inconsistent with that relief, to which the clear equities of the appellees entitle them. In transfering the power to another tribunal, the court know of none more safe, none so convenient, as the trustee by whom the leases are to be made and executed. So much of the Chancellor's decree therefore, as appoints *Cumberland Dugan*, trustee for the purpose of executing and performing the agreement, and gives costs to the appellees should be affirmed with costs: but the residue of said decree must be reversed, because the leases are not decreed to be made for ninety-nine years with liberty of renewal, as directed by said agreement: and upon a ground not involving the gist of the controversy between the parties, and therefore, perhaps, not noticed in the argument: but which obviously appearing on the face of the decree, cannot be disregarded by this court. One fourth part of the rents received by the trustee, are directed to be paid to the said *Eliza Coale*, her *executors* and *administrators*; and in like manner, one other fourth after the death of the said *Hannah Kitty Chase.* The interest of *Eliza Coale*, in that portion of the rents, to her payable, under the deed from *John E. Howard* to *William Paca*, is real, not personal estate; and as such cannot be limited to her *executors* and *administrators* after the manner of personality. Such a limitation is contrary to the rules of law, and by it nothing passes but a life estate to *Eliza Coale:* her *executors* or *administrators* take nothing. *Vide* 6 *Ba. Abr. p.* 21, *tit. Rent. letter H.* Tis true, the decree of the Chancellor has literally pursued the agreement; but where an agreement contains provisions, which, by reason of some technical principle of law, cannot be carried into effect according to its literal import, it is the duty of a court of equity for the sake of the intent, to give it that construction which the rules of law will tolerate, and the intention of the parties to be collected from the whole instrument will justify. This will be effected, by ordering the rents to be paid to *Eliza Coale* and her *heirs* instead of *executors* and *administrators.* As authorities to shew that courts of equity to gratify the intent, construe agreements even contrary to the words, we would refer to 1 *Brid. Ind.* 430. *pl.* 6—7, and to 5 *Ves.* 399. 1 *P. Wms.* 234.

Although the appellees do not appear before us, seeking any revision or alteration of the decree; yet as it is to be new-modeled to secure the rights of the appellants: such a change should be made in it, as will do equal justice to both parties. Instead therefore of *Mary Barney's* moiety of the rents, after her death, being made payable to her children, their *executors* and *administrators*, as directed by the decree, it should be to her children and their *heirs.* And as the appellees have done nothing, which could authorize a court of Chancery to transfer to *Cumberland Dugan* the right, which by their agreement they have reserved to themselves, of deciding on the reasonableness of the rents reserved; the trustee should be enjoined to execute leases for such rents, as he, together with *William Barney* and *Mary* his wife, and *Hannah Kitty Chase* should think reasonable.

A decree, in conformity to these suggestions will be signed by the court.

UNION BANK OF MARYLAND *vs.* EDWARDS.—December, 1829.

The rule, that a court of equity will sometimes adopt a more liberal and enlarged construction than prevails at law, can never be tolerated, unless it be necessary to effectuate the motives which induced a contract.

Relief, by the doctrine of substitution, is never extended to a security, but upon the assumption that the creditor's debt has been, or is to be fully paid—that his further detention of the mortgaged property, is against equity and good conscience.

So where a mortgage was executed, for the purpose of securing the payment of all and every sum or sums of money, then owing, or which might thereafter be due and owing, from the mortgagor to the mortgagee, upon any promissory note, or notes negotiated or to be negotiated with the mortgagee, of which the mortgagor might be drawer, or endorser, or otherwise however, and upon sale of the mortgaged premises, the proceeds being insufficient to pay a note of the mortgagor's to the mortgagee, for which the latter had no other security than the mortgaee; *it was held*, that an accomodation endorser on a note of the mortgagors, discounted by the mortgagee after the execution of the mortgage and before the sale, could not call upon a court of equity to distribute the fund above mentioned, rateably, in payment of both notes.

APPEAL from the Court of Chancery. In this case a bill was filed on the 18th of December, 1822, by the appellants, against *William Stansbury*, for the sale of certain lots of ground in the city of *Baltimore*, mortgaged by him to them, on the 27th of July, 1822, for the purpose of securing the payment of all and every sum or sums of money then owing, or which might thereafter be due or owing from *Stansbury* to the *Union Bank*, upon any promissory note or notes negotiated, or to be negotiated at the said bank, which was or might be drawn or endorsed, or otherwise however; with a proviso, that if *Stansbury* should, when thereunto required, pay unto the said bank, all and every, the sum or sums of money then owing, or which might thereafter become due or owing from him to the said bank, either upon any promissory note or notes that had already been, or which might thereafter be negotiated at the said bank, of which he might be drawer, or endorser, or otherwise howsoever, then the said mortgage was to be void. Such proceedings were had upon the said bill, on coming in of the answer, admitting the facts stated in the bill, and consenting to a decree for the sale of the mortgaged premises, and that out of the proceeds of sale, the sum of $20,000 due to the complainants, with interest thereon, should be paid; that at December term, 1822, a sale was decreed; provided that not more than $19,258 be paid to the complainants. The property was sold by the trustee, appointed for that purpose, to the amount of $12,005 33, and the sales were ratified.

On the 10th of December, 1824, and also on the 21st of February, 1826, *Elizabeth Edwards* (the now appellee) filed her petitions. The first petition stated, that in the year 1822, she had loaned her name for a small amount to *William Stansbury*, and had either drawn or endorsed notes for his use and accommodation accordingly, which notes had been and were discounted by the *Union Bank.* That subsequently thereto, *Stansbury* wishing to obtain further discounts at said bank, and in order to secure the payment of all and every sum or sums of money, then due, or which might thereafter become due, and prevent any loss whatever, on the notes so loaned or endorsed by her, or by other persons, or which might thereafter be loaned by her or others, and discounted at said bank, did on the 27th of July, 1822, execute a deed of conveyance by way of mortgage to the said bank, whereby he conveyed to them his real estate, or the greater part thereof, which was large, and consisted of a variety or number of lots and improvements, situate in the city of *Baltimore.* That the said property was intended and expressed in the said deed to be conveyed for the purpose of securing the payment of all and every sum or sums of money, then due and owing, or which might thereafter become due or owing, from *Stansbury* to the said bank upon any promissory note or notes negotiated, or to be negotiated at the said bank, of which *Stansbury* might be the drawer or the endorser. That the understanding and intention of all the parties, being, that the said property should be responsible for all notes negotiated or to be negotiated, at the said bank for *Stansbury*, and the petitioner believing the said property to be valuable at the time, and sufficient to secure a large amount; and believing further, than in the event of a failure of *Stansbury* at any time to pay such notes, the said property would be sold, and the petitioner and the other drawers and endorsers made responsible only for any deficiency (if any existed,) or that upon their paying such notes, the same could be assigned to them, she did not hesitate from time to time, to renew the notes which she had drawn or endorsed for *Stansbury* before said deed was executed, and also draw and endorse other notes in his favor, for his accommodation, which were discounted or continued at the said bank. The petition then stated the filing the bill by the bank and the sale of the property, &c. *Prayer*, that the proceeds of the sale may be applied to payment *pro rata* of the said notes held by the bank, and drawn and endorsed by *Stansbury*, &c. The last petition after referring to the proceedings which had taken place in this case, stated, that the said mortgage from *Stansbury* to the complainants, was designed and intended by the parties thereto, to secure all the notes discounted or negotiated at the *Union Bank*, for *Stansbury's* use, or in the event of its falling short of the whole amount, then upon a sale becoming necessary, that the proceeds should be applied rateably to the discharge of said notes. That the complainants now seek to apply the whole proceeds to the extinguishment of a particular debt, alleged by them to be due and owing to them from *Stansbury;* although the petitioner conceives the same is not embraced by the mortgage, and forms no part of the negotiated notes discounted for his use, and which alone were intended to be secured by the mortgage—*Prayer* that the auditor be directed to state an account excluding the present alleged claim of the complainants, and distributing and applying the proceeds to the payment of the notes negotiated by *Stansbury* at the said bank, and there discounted for his use and accommodation; and another account whereby the same funds shall be distributed and applied rateably to the alleged claim of the complainants, and to the notes negotiated and discounted for *Stansbury;* and that the complainants produce to the auditor the several original promissory notes held by them and discounted for the use of *Stansbury*, &c.

To this petition the complainants answered, stating among other things, that in the year 1822, and previous thereto, *Stans-*

bury was indebted to them to the amount of $15,000 and upwards, upon certain promissory notes discounted by them for the use and benefit of *Stansbury;* and that on some of these notes made in the fall of the year 1822, the said *Elizabeth Edwards's* name appeared as drawer or endorser; that on the 27th of July, 1822, *Stansbury* executed the deed of mortgage, &c. That after the execution of the said mortgage, *Stansbury* continued to present paper whereon he was drawer or endorser, for various amounts and at various times, with intent to have the same discounted for his use and benefit, which said paper was from time to time discounted, and portions thereof were also from time to time renewed by other notes. That these negotiations were continued until 1824, and in June and July of that year, *Stansbury* then stood indebted upon notes whereof he was drawer or endorser, viz. a note for $8700, drawn on the 17th June, 1824, by *Stansbury* in favor of J. P. cashier, at sixty days. A note drawn on the 12th of July, 1824, by *Stansbury* in favor of *Elizabeth Edwards* for $600, and endorsed by her, and *Wilmer* and *Palmer.* Three notes, the first dated the 8th of July, 1824, for $1800; the second dated the 14th June, for $1200, and the third dated the 19th of July for $700. All three drawn by *Elizabeth Edwards* in favor of *Stansbury,* and by him endorsed; and *Stansbury,* was also indebted to the said bank on two notes, the first drawn by *N. M. Bosley* in favor of *Stansbury* for $300, dated the 17th of June, 1824, and the other drawn by *J. Medtart* in favour of *Stansbury* for $200, dated the 17th of July, 1824, both of which notes were subsequently paid by their respective drawers; but the other notes before mentioned never were paid to the bank, and still remain due and unpaid. That soon after the execution of the deed of mortgage, the respondent filed their bill for the foreclosure thereof, the same having become forfeit, and a decree by consent was accordingly obtained for a sale, &c. That the property was sold to the amount of $12,005 33. That the said sum was answerable for the payment of certain liens there out, which were to be paid before any portion of the above mentioned notes were entitled to be liquidated; which said liens consisted of, &c. which said liens thus reduced the amount subject to the payment of the said notes to a sum less than $8000. That the sum thus left is not sufficient to pay the first note due by *Stansbury* for $8700. They utterly deny that there was any understanding or agreement between them and *Elizabeth Edwards* or *Stansbury*, that the mortgaged premises when sold should be applied to pay the notes whereof *Mrs. Edwards* was either drawer or endorser, or that any *pro rata* distribution of the fund should be made in her favor, or that there was any agreement or understanding between the said parties, *other than that recited in the said deed of mortgage.* They aver that in granting the discounts as aforesaid to *Stansbury*, they were regulated by their opinion of the solvency of *Mrs. Edwards*, in determining whether they would grant discounts with her name; and took her name as a further and additional security for the payment of the notes by *Stansbury*, lest the security of the mortgaged premises should be, as it turned out to be, insufficient for their indemnification against loss; and they would not have lent their money upon the security of *Mrs. Edwards's* name, if they had been apprized that she could or would claim any benefit from the security of the mortgaged premises, as she now pretends to do by her petition. They are advised that *Mrs. Edwards* has no right in equity or in law to claim a payment of the notes whereon her name appears, until all the liabilities which were intended to be secured by the said mortgage be first satisfied. *Prayer* that the petition be dismissed, and the respondents be permitted to take such benefit from the mortgage as they are entitled in equity and conscience to demand.

Affidavits were filed by *Mrs. Edwards;* one of them, that of *William Stansbury*, who made oath that *Mrs. Edwards* became drawer or endorser on notes discounted at the *Union Bank* for the accommodation of the deponent, some time in August, 1822; that her name was substituted upon said notes for *R. Middleton's*, who was considered as in bad credit; and that *Mrs. Edwards* consented to lend her name on said notes under the express assurance that the payment of them was fully secured by the mortgage deed of a large amount of property to the said bank, which he believed would have been amply sufficient to have secured the payment of all the notes at the said bank, had it not been disposed of at an immense sacrifice.

Bland, Chancellor, (April 28, 1826.) The matter now presented to the consideration of the court, arises out of the petition of *Elizabeth Edwards* and the answer thereto of the bank. The counsel on both sides have been heard, and the proceedings considered.

It appears, that *Stansbury*, the defendant, with a view to obtain such loans of money as he might want, on the 27th of July, 1822, mortgaged the whole of a considerable proportion of his property to the *Union Bank*, the plaintiff; which, it was stipulated should stand as a security for all and every sum or sums of money then owing, or which might thereafter become due and owing from *Stansbury* to the *bank*, either upon any promissory note or notes, that had then been or might thereafter be negotiated at the bank, of which he might be drawer or endorser or otherwise howsoever. At the time this deed was made, *Stansbury*, it is alleged, was indebted to the bank to the amount of $15,000 and upwards, by notes, of which he was either drawer or endorser; and some of which were endorsed by *Elizabeth Edwards*, the petitioner. After which, on the 18th of December, 1822, the bank filed their bill here to have the mortgage foreclosed; and on the 27th of the same month, by consent, obtained a decree for a sale; and a sale has been made accordingly. But notwithstanding this judicial proceeding, the negotiations between these parties were, from time to time, renewed and continued down to the month of July, 1824, when it appears, that *Stansbury* stood indebted to the bank to a considerable amount by promissory notes; one of which, dated ion the 17th of June, 1824, for $8700, was given by *Stansbury* directly to the bank itself without any endorser; all the other notes were endorsed or drawn by other persons—the greater amount by *Elizabeth Edwards*, the petitioner.

The case is somewhat complex; but it appears to me, to be resolvable into this: The *Union Bank* is the creditor of *Stans-*

bury to a considerable amount, for the payment of the whole of which it holds a lien upon the mortgaged property, and for a part it holds the additional personal security of *Edwards's* endorsements of *Stansbury's* notes. This relationship of principal and debtor, and of a surety to a creditor who held a pledge of property as an additional security, existed, as relates to *Edwards*, on the execution of the mortgage deed, and has been, from time to time, revived, renewed, and continued ever since. I shall, therefore, consider these parties as now standing in this predicament and relation to each other.

The petitioner insists on having the proceeds of the mortgaged property, applied to the payment of the aggregate amount of debts due by *Stansbury* to the bank, as far as they will go, without distinction or discrimination. On the other hand, the bank contends for the right to apply those proceeds exclusively to the payment of *Stansbury's* note for $8,700, on which they have no endorser or other personal surety than *Stansbury* himself.

The relationship of creditor, principal debtor, and surety, lays the creditor under certain obligations, which he is not allowed by either a court of law or equity to violate with impunity. Although, as between obligee and surety, there is no obligation of active diligence against the principal; and delay, unaccompanied by fraud, or a positive agreement with the principal, will not operate as a release of the surety; yet, if a creditor undertakes, by express stipulation, to extend the time of payment, or to allow the principal to pay by instalment; or if the obligee begins to sue the principal and afterwards gives time; or if the creditor in any manner waives, or postpones his right to sue immediately the debt becomes due, the surety will be discharged, as well at law, as in equity. Because, immediately, on the next day after the debt becomes due, the surety has a right to file his bill here, to force the creditor to bring suit; and, therefore, an express and stipulated indulgence given by the creditor to his principal debtor is fatal to his claim against the surety, since it deprives him of this equity.

The taking of a mortgage by the creditor from the principal debtor, is calculated to inspire the surety with confidence. He is thereby induced to relax in his vigilance; and to forbear obtaining a sufficient guaranty as an indemnity against his eventual liability. Such a mortgage becomes a trust for the direct interest of the creditor, and also, for the direct benefit of the surety. From such circumstances, therefore, an equity arises, that the creditor shall not invalidate, or by any wilful act vitiate his mortgage security to the prejudice of the surety. And also, because the surety, should he be compelled to pay the debt, has a right to call upon the creditor to be put into his place, in all respects; since, in equity, or such an event, he becomes entitled to be considered as the substitute of the creditor; and to have the mortgage, and all other securities given by the principal debtor, assigned to him. And this right of the surety stands not upon any thing expressed in the contract, but is based upon the principles of natural justice.

The principles in relation to double securities and marshaling assets do not strictly apply; but, they have a bearing which fortifies and illustrates the equity by which this case is governed. In those cases, where a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien, or which he cannot reach. This, however, is done for the benefit of *creditors*, not of the debtor, though it arises out of his acts, and he does receive benefit from it. This doctrine, in relation to double securities, and marshaling assets, has been long established here; and is, I am inclined to believe, carried farther than in *England*. To illustrate this matter, let us suppose, in this instance, that *Elizabeth Edwards* was dead, and that the proceeds of her real estate were now here to be distributed among her creditors. If the bank were to present their claims, as founded on these notes of *Edwards*, endorsed as surety for *Stansbury*, the court would require them to show, that *Stansbury*, the principal debtor, was insolvent, before they would be allowed to come in for a distributive share of *Edwards's* assets. This marshaling of the assets and securities would be made only, at the instance, and for the benefit of *Edwards's* creditors; yet her representatives might also receive material benefit.

But, in this case it is a *surety*, not a creditor, who asks to have the burthen of this claim shifted over from one point of pressure to another. It is the surety who wishes the creditor to be directed to take his satisfaction from his principal debtor, so far as he can obtain it, before he is allowed to demand payment of the surety. It is believed, that a Court of Equity has never, in any case, gone so far, at the instance of a surety, as to turn a creditor away from one fund upon which, according to the express terms of the contract, he had a fair and an unquestionable claim, to seek payment from another, as he could, and which might, or might not, be made effectual. Nothing can be more delicate than the interference, either of the Legislature or of the Court of Chancery, taking away those stipulated rights which the debtor has thought fit to grant. Such an arrangement, or marshaling of securities, it seems to me, would be pressing too closely upon that constitutional restriction, which forbids even our Legislature from impairing the obligation of contracts. The surety is the guarantee, and it is his business to see, whether the principal pays, and not that of the creditor.

But, where nothing is hazarded, and every thing may be attained which was contemplated by the parties, when they entered into the contract; in such case a court of equity may fairly, and safely interpose; because, by doing so, it does not, in any sense, impair the obligation of the contract; but a new and equitable direction is given to it, for the prevention of wrong, and for the purpose of doing more ample justice to all. And, therefore, where it is shown, that the creditor has the clear means of making his demand effectual, and there is no risk, delay or expense; as when the money was in the next room, or an ample indemnification against the consequences of risk, delay and expense, the surety has a right to call upon the creditor to do the most he can for his benefit. As if the surety deposits the money, and agrees that the creditor shall be at no expense, he may compel the creditor to prove under a commission of bankruptcy, and give the benefit of the assignment to the surety in that way. Other examples might be adduced equally strong to show, that a creditor may, under circumstances, be called on to act for the benefit of the surety. In those cases, it is not by force of the contract; but of that equity upon which it is considered against conscience, that the holder of the securities should use them to the prejudice of the surety, where he himself can be exposed to no risk whatever.

Here it is clear, that the mortgage comprehends all the debts due by notes from *Stansbury* to the bank, as well those for which *Edwards*, as drawer or endorser, was surety, as all others. And it is certain, that the bank can run no risk in doing what is now asked; because the proceeds of the mortgaged property, are now in the hands of this court, or of the trustee, its officer, ready to be delivered over. To the extent of these proceeds, therefore, this creditor not only has the clear means, but the absolute certainty of rendering his demand effectual against his principal debtor. As the bank would not have been permitted to invalidate or enfeeble its mortgage to the prejudice of *Edwards*, so neither can they be allowed to shift and misapply its benefits to her disadvantage. If the bank chose to trust *Stansbury* on his note and mortgage alone, and they should sustain any loss, they have only themselves to blame. It is enough for *Edwards*, and sufficiently maintains her equity, that the bank cannot lose any portion of the debt for which she is surety, by having that pledged property first applied towards its satisfaction, since it clearly formed a part of that aggregate amount of debt, intended to be secured by the mortgage.

Upon the whole, it is my opinion, that the proceeds of this mortaged property, or so much thereof as may remain after all prior liens upon it have been fully paid, must be applied to the satisfaction of the total or aggregate amount of the sums of money due on notes by *Stansbury* to the bank; and that *Edwards*, as surety, is entitled to the equitable benefit of this application of these proceeds; and that she is liable to the bank for the balance and no more. As for example, if the bank should obtain from these proceeds only twenty-five cents in the dollar with interest, *Edwards* must be held liable for seventy-five cents in the dollar with interest, to the amount of which she was surety and no more.

Wherefore it is ordered, that this case be, and is hereby again referred to the auditor, with directions to state an account or accounts according to the principles that have been thus explained and determined.

The complainants afterwards on the 17th of July, 1826, petitioned the Chancellor for leave to amend their answer to the petition of *Elizabeth Edwards* for the purpose of introducing therein a variety of facts which were unknown to the Chancellor at the time of the hearing, and that a re-hearing may be had, &c. Accompanying the petition were several affidavits, with a list of the notes drawn by the said *Edwards*, &c.

Bland, Chancellor, (July 19th, 1826) after hearing the solicitor of the petitioners on the foregoing petition, and considering the same, together with the proceedings.—*Ordered*, that the said petition be dismissed with costs. From which several orders in the premises the complainants appealed to this court.

The auditor afterwards, on the 1st of May, 1827, reported an account, and thereby applied the nett proceeds of the sales, to the payment of the trustee's commission, costs of suit, ground rents and taxes, the prior mortgage to *Richard Sommerville*, and dividends on the amounts of the notes held by the bank.

The counsel of the parties entered into an agreement, after the appeal was depending in this court, "that the affidavits filed by the appellee in support of her petition, and those filed by the appellants with the petition of the 17th of July, 1826, be received as evidence in the cause, as if the same had been duly taken before the hearing of the same. And also the auditor's last report, be confirmed by the Chancellor, and be admitted as part of the record in this cause, as if the same had been done before the appeal was entered; and that all other audits be dispensed with."

Bland, Chancellor, (25th June, 1828.) On consideration of the agreement this day filed,—*Ordered*, that the statement of the auditor be ratified and confirmed; and the trustee directed to apply the proceeds accordingly, with a due proportion of interest that has been or may be received.

The cause was argued in part at June term, and concluded at the present term, 1828, before BUCHANAN, Ch. J. and ARCHER and DORSEY, J.

Kennedy for the appellants contended, that the Chancellor erred in his opinion as expressed in his orders in the cause, for the following reasons:

1. That *Mrs. Edwards*, who was the drawer of certain notes, which were discounted by the appellants for the use and benefit of *William Stansbury*, was not entitled to have the same admitted to a rateable dividend upon the mortgage fund, until the appellants were satisfied in their principal debt of $8700 against *Stansbury*.

2. That there was error in directing the account to be so stated, as to include the notes of *Mrs. Edwards*, the fund not being sufficient to pay the note of *Stansbury*, which had been discounted upon the security of the mortgaged premises alone.

3. That the Chancellor erred in supposing, against the facts of the case, that the notes of *Mrs. Edwards* were in existence at the date of the mortgage, and designed to be secured by it.

4. That he also erred in the opinion, that the appellants were guilty of any laches in availing themselves of the mortgage fund, to the prejudice of the appellee.

1. Parol evidence is admissible to explain an equitable mortgage; also, that an absolute deed was intended as a mortgage *Ex parte Langston*, 17 *Ves.* 227. 3 *Stark. Evid.* 1052.

2. *Mrs. Edwards* has assumed the privilege of a surety. She cannot stand as a surety. He adverted to the case of *Clopper vs. Union Bank of Maryland*, 7 *Harr. & Johns.* 92. When the mortgage debt is paid, then the surety is to stand in the place of the creditor. *Mrs. Edwards* might come in for the surplus. *Hays vs. Ward*, 4 *Johns. Ch. Rep.* 123. *Cheesebrough vs. Millard*, 1 *Johns. Ch. Rep.* 409. *Stevens vs. Cooper*, *Ib.* 430.

Wright vs. Simpson, 6 *Ves.* 734. *Craythorne vs. Swinburne*, 14 *Ves.* 164.

3. The notes of *Mrs. Edwards*, were not a substitute in the place of the notes drawn or endorsed by *Middleton*. If they were, such substitute could not have been for more than $500.

4. He denies the want of due diligence on the part of the bank. There was no application made to the appellants by the surety to proceed against the principal. *Wright vs. Simpson*, 6 *Ves.* 734. *King vs. Baldwin*, 2 *Johns. Ch. Rep.* 554.

R. Johnson, for the appellee. 1. Assuming *Mrs. Edwards* to be a surety of *Stansbury*, and as such, that she would have been entitled to the benefit of the mortgage. Has she placed herself in a situation to claim the protection of this court? The debt has not been paid; and the surety is entitled to the benefit of the pledge made for its payment to the creditor. *Hayes vs. Ward*, 4 *Johns. Ch. Rep.* 132. The proper time for applying to the Court of Chancery for apportionment has arrived. *Ex parte Langston*, 17 *Ves.* 227.

2. Is not *Mrs. Edwards* to be considered as a surety, and entitled to protection as such, though she was not known by the bank? *Clopper vs. Union Bank of Maryland*, 7 *Harr. & Johns.* 92. *Claythorne vs. Swinburne*, 14 *Ves.* 170. The mortgage being of record, showed to the world, that whatever note was drawn or endorsed by *Stansbury*, came within the provisions of the mortgage.

3. Is not *Mrs. Edwards* entitled to be protected by the mortgage, equally with the other endorsers of the notes of *Stansbury?* The mortgage was not to pay any *particular* note or debt then due to the bank; and in the answer of *Stansbury* to the bill filed against him for a foreclosure of the mortgaged premises, he stated that he owed the bank $20,000. The decree by consent, was, however, to pay the complainants not exceeding $19,258. This sum covered the whole amount of all the notes of *Stansbury*, including those drawn or endorsed by *Mrs. Edwards*. There is nothing in the mortgage to show that it was to secure the preferred debt of $8700, arising upon *Stansbury's*

note to the bank, on which there was no endorser; and no parol evidence can be admitted to contradict the mortgage.

4. The agreement relative to the evidence taken after the decree, was not intended that the whole of what was contained in the affidavits should be used as evidence; but only such as was legally admissible. A great part of the facts proved, do not apply to the issue between the parties. *Hayward vs. Carroll*, 4 *Harr. & Johns.* 521. *Jones vs. Slubey*, 5 *Harr. & Johns.* 382. *Westley vs. Thomas*, 6 *Harr. & Johns.* 24, 27. The evidence is that the mortgage was executed to secure a particular debt due at the time. In the answer to the appellee's petition in the case under the agreement, the bank prayed to amend it, which the Chancellor refused to grant. The evidence was inadmissible on the ground that it contradicted the mortgage. It changes the legal operation of a particular clause in the mortgage. *Westley vs. Thomas*, 6 *Harr. & Johns.* 27. *Watkins vs. Stockett*, *Ib.* 435. The mortgage was to secure *all notes* drawn or endorsed by *Stansbury.*

5. The evidence is sufficient to show that the notes drawn by *Mrs. Edwards*, were a substitute for the notes which had been drawn by *Middleton* in favor of *Stansbury*, and by him endorsed to the bank; and that the notes so drawn by *Middleton*, were in the bank at the time of the mortgage.

Williams, (District Attorney of U. S.) also for the appellee. The bank could not but know most of the transactions and intentions of the parties in 1822, rather than in 1826. The mortgage, bill, answer and decree were all in 1822, and show the clear understanding of the parties. *Middleton's* were clearly accommodation notes—commenced in 1821, and continued to August, 1822. They were then retired by *Mrs. Edwards's* notes, and not by the receipt of $9000. In *Baltimore* the borrowers on accommodation notes *generally*, almost universally appear as *endorsors* and not as drawers. All the notes are dated *two* years after the mortgage deed; and, therefore the *terms* of the mortgaged are insisted on. The notes of *Middleton* and of *Mrs. Edwards*, were expressly proved to be accommodation notes, this was proved by *Stansbury.* Certain depositions were filed after the Chancellor had decreed on the proceedings under the petition of *Mrs. Edwards.* The deposition of *Pinkney* contradicts that of *Stansbury*, and is contradicted by all *probability* and *bank operations.* The deposition of *Stansbury* contradicts his former deposition, and is contradicted by the deposition of *Frisby*, which is mostly to be relied on —*Stansbury* is a director of the bank.

The bank cannot elect to apply this money. 1. Because the deed of mortgage forbids such election; and parol testimony is not admissible.

2. Because they signified a different election at the time of filing their bill, &c. *Ham. Dig.* 253. *Devaynes vs. Noble*, 1 *Meriv.* 608.

We appeal from the conduct of the bank in July, 1826, to their conduct in 1822; and insist on the decree of 1822. No parol understanding can be admitted to contradict the mortgage, bill, decree, &c. *especially* so as to affect third parties.

1. The bank do not pretend an ignorance that the notes of *Mrs. Edwards* were *accommodation* and not *real* notes, until *after* the decree of 1826. Yet *Mrs. Edwards* expressly states them to be accommodation notes in her first petition. But it is no matter whether the bank knew it or not, if they were *really* so. Her notes were *substituted* for those of *Middleton;* and are so proved. If they were not *substituted;* yet her notes are comprehended in the *terms* of the mortgage, bill, answer and decree, &c.

2. The bank had the power to limit *all* their discounts to within the value of the property; while *Mrs. Edwards* had no such control.

3. The late language of the bank, and *Pinkney's* deposition are inconsistent with their being *real* notes.

4. *Mrs. Edwards* is *prima facie* entitled under the mortgage deed; and she is only to be thrown out by being shown to be a debtor. She relied on the mortgage as recorded. She does not ask for the money, but only asks for its proper application.

Taney (Attorney General) in reply.

The question is, whether or not the fund arising from the sale of the mortgaged premises, is to be applied to the payment of a particular note, mentioned in the mortgage, or *pro rata*, to the payment of the whole of the notes?

The mortgage was given to secure the debt of $9000, and neither the Bank, or *Stansbury*, understood or intended, that any other note was to be paid, or secured by it, until after the payment of that debt. This is proved by *Pinkney* and *Stansbury*.

The mortgage was for the benefit of the Bank, and not for the securities.

1. Independent of the parol evidence, what is the effect of the mortgage?—it was taken by the bank for its own benefit, not to indemnify securities. The bank could never have intended to place themselves upon the footing, on which the decree has placed them. The liability of the endorsers, &c. was superadded to that of the mortgage. The endorsers have no equity—they were not deceived by the bank—the bank is not responsible for what *Mrs. Edwards* might have in view, or thought, or was informed on the subject, not proceeding from it, or its agency. The mortgage embraces all notes, whether *Stansbury* be drawer, or endorser, principal, or surety—suppose *Stansbury*, to be the endorser; then he is to come in, according to the decree as surety, and claim to be exempted *pro rata*—all securities are not of necessity to contribute *pro rata*, it depends upon the engagement entered into. *Craythorne vs. Swinburne*, 14 *Ves.* 160.

The mortgage was not to protect the securities at the expense of the bank.

Suppose *Stansbury* to be solvent, and able to pay his debts, could not the bank, go against *Mrs. Edwards*, and leave her to her remedy against *Stansbury*. She has no right to demand of the creditor any fund, until the creditor is satisfied. Could she come upon the fund, and compel the bank to proceed against *Stansbury*, if he was in a condition to pay?—4 *Johns. Ch. Rep.* 123, 124, 131. 2 *Johns. Ch. Rep.* 554.

Mrs. Edwards's notes were not substituted for those of *Middleton. Mr. Pinkney's* evidence disproves that, and none of *Mrs. Edwards* notes correspond with *Middleton's*.

Mrs. Edwards was not a security on any of the notes when the mortgage was executed. *Middleton's* was a *real* and not an accommodation note.

2. If the parol evidence is admissible, it is conclusive. Is it admissible?—Between these parties it is, to shew what debt, it was the object of the mortgage to secure. The mortgage is no estoppel as to *Mrs. Edwards*, as she was no party to it. As between the immediate parties to the instrument parol evidence would be inadmissible; but the rule is different, as regards a stranger. There can be no estoppel, unless it is mutual. It operates between the parties to the instrument, but does not apply to strangers. 3 *Stark. Evid.* 1052, 1054. *Craythorne vs. Swinburne*, 14 *Ves.* 159, 168, 170.

The parol evidence is not offered to contradict the terms of the mortgage; but in aid of it, to shew the amount of the sum raised—who were the drawers, and who the endorsers.

This is not a case in which a regular issue is joined. A fund is in court, which two parties claim. The question was how the fund was to be distributed? Not to be placed before the court, by bill and answer, or any regular form of pleading. Nothing more was necessary, than to state the ground, upon which each party, claimed the fund.

3. It is said the bank was too late. That the decree for the sale changed the relative situation of the parties.

The Chancellor dismissed the petition of the bank, upon the ground that he had made up his opinion, as to the manner in which the fund should be distributed.

R. Johnson for appellee—In explanation of the rule as to the admissibility of parol evidence. The rule in relation to parol evidence is, that no one of the parties to the written contract, can introduce it, especially as against strangers to it. As between parties to the instrument, it might be admitted in some cases. *Union Bank vs. Betts and wife*, 1 *Harr. & Gill*, 175.

Dorsey, J. delivered the opinion of the court. The rights of the parties in controversy in this cause, entirely depended upon the true construction of the mortgage from *William Stansbury to the Union Bank of Maryland*, bearing date the 27th day of July, 1822. Its objects as set forth in the recital, was to secure the payment to the *Union Bank of Maryland*, of all and every sum, or sums of money then owing, or which might thereafter become due or owing from the said *William Stansbury* to the said bank, upon any promissory note or notes negotiated, or to be negotiated, at that bank, of which he was or might be either drawer or endorser. He is described as a merchant of the city of *Baltimore*, and it is apparent that by the execution of this deed, he designed not only to provide an indemnity to the bank for what he already owed, but to obtain for himself a credit at that institution, which would induce a more free discount or negotiation of notes, on which *Stansbury's* name should appear as either drawer or endorser. Such a facility is an object of primary importance to him who is engaged in commercial pursuits. Its value to *Stansbury* is manifest, enabling him to obtain an immediate accommodation discount of nine thousand dollars on his own note, without an endorser. In litigating these rights, it is competent for either party to prove, what notes drawn and endorsed by *Stansbury*, and discounted at the *Union Bank*, existed on the 27th of July, 1822, when the mortgage was executed; and also all such as were negotiated at that bank, subsequently to that period. The first negotiation of *Elizabeth Edwards's* paper, was in September, 1822.

To this mortgage, *Stansbury* and the *Union Bank* alone were parties. Under it at law, no right was acquired, no interest passed; upon it, no action could be maintained but by the *bank*. All the circumstances which preceded its existence, and immediately followed its birth, demonstrate that the object of its execution was, not to indemnify those who were or might become his drawers or endorsers; but to ensure to the *Union Bank*, the payment of all notes negotiated by them, on which his name might appear either as maker or endorser. 'Tis true, if the fund had been sufficient, those who were on his paper, would in equity be protected from loss. But this was a consequence, not the design of his act. The legal construction of this instrument, is in strict accordance with what we have stated as the manifest object of its creation Such being the posture of the parties at law; upon what principle is it, that a court of equity can be called on to change their condition? In construing agreements, it is said a Court of Chancery will sometimes adopt a more liberal and enlarged construction, than prevails at common law. But this latitude, if it exist at all, can never be tolerated, unless it be necessary to effectuate the motives which induced the contract. Here, no such necessity exists. The most perfect harmony prevails between the agreement executed, and the obvious intention of its framers. To adopt the interpretation of the mortgage, which was insisted on for the appellee, viz: that the property was conveyed to the bank, in trust to be appropriated rateably to the payment of all notes negotiated with them, of which *Stansbury* was either the drawer or endorser, would be to defeat a leading object of *Stansbury* in making the conveyance. Instead of giving additional credit to his name, and a consequent increase to his favors at the bank; it would have been the most effectual means which he could have adopted, to exclude himself from all further discounts. As he then stood, the payment of the nine thousand dollar note, was amply covered by the property mortgaged. But every additional discount in proportion to its amount, reduced the security for the payment of that note. So that should the *bank* have increased their accommodations to *Stansbury* to ninety thousand dollars, they would thereby have relinquished nine-tenths of the security, which they had previously held for the payment of the note of nine thousand dollars. Nay, such are the positive terms of this deed, if clothed with the attributes of a deed of trust, which are attempted to be affixed to it, that should *Stansbury*, holding a real note of the most opulent merchant in Baltimore, have obtained its discount at the *Union Bank*, *eo instanti*, such merchant might demand its entire, or *pro rata* payment out of *Stansbury's* mortgaged estate. The deed providing, not merely for the payment of notes negotiated for the account or accommodation of *Stansbury*, but of all notes bearing *Stanbury's* name, no matter for whom discounted.

The attempt to sustain the claim of the appellee by the doctrine of substitution, is equally untenable. Such relief is never extended to a security, but upon the assumption that the creditor's debt has been, or is to be fully paid: that his further detention of the mortgaged property is against equity and good conscience. Can it be deemed an equitable substitution, which whilst it left in full force and unsatisfied, the just claims of a creditor, should wrest from him the fund specifically pledged for their payment, and leave him destitute of any other source to which he might apply for indemnity? If after satisfying all debts due to the *Union Bank* on *Stansbury's* notes by them discounted, there should remain a surplus of the mortgaged fund, to that amount, might the drawers and endorsers of his accommodation notes, who had made payments to the *Union Bank*, seek to be substituted?

The order of the Chancellor ratifying the auditor's statement, making a rateable distribution of the proceeds of sale of the mortgaged premises, between *Elizabeth Edwards*, and the *Union Bank of Maryland*, is reversed with costs, so far as regards the application of the funds to the payment of *Stansbury's* notes negotiated at said bank. The order, so far as it ratifies the residue of said statement, is affirmed.

This court will sign an order or decree, directing the trustee to pay the amount thus applied to the *Union Bank of Maryland* on account of *William Stansbury's* notes to them for $8700.

HAYS *vs.* RICHARDSON.—December, 1829.

No person who is called as a witness, not being a party to the suit, can refuse to give testimony on the ground, that he may thereby become liable to a civil action not of a penal nature, or sustain pecuniary loss, or that the verdict may be used as evidence against him in some other civil proceeding then pending, or which may thereafter be instituted.

A witness on the *voir dire*, may by the party objecting to his examination in chief, for the purpose of shewing his interest, be called on to state the contents of written instruments, which are not produced; and the reason assigned is, that the party objecting, could not know previously, that the witness would be called, and consequently, might not be prepared with the best evidence to establish his objection.

An instrument of the following tenor—"I hereby authorize R to open, and continue open, a road through my field, beginning at, &c. as also to build, keep in repair, and use a bridge over the branch, in the field on which the said road will pass, said road and bridge being intended as well for the public use, as the use of R; and to continue until R and myself shall agree it shall be shut up or altered;" executed under the hand and seal of the owner of the land, is a grant of an incorporeal hereditament, a right of way *de novo*, which will endure until both parties agree upon its discontinuance, and which must be acknowledged, and recorded according to our acts of registration.

A right of way in *esse* may pass by deed of bargain and sale, duly acknowledged and recorded.

A transfer of way *de novo* may be by grant or lease, but cannot be effected by way of bargain and sale.

A right of way may be said to lie in the county where it exists, or is exercisable.

The acts of Assembly of 1715, ch. 47, and 1766, ch. 14, being in *pari materia*, must be construed together as one system. The first having embraced incorporeal tenements, and hereditaments, there is no reason why they should be excluded from the second. The act of 1766, cannot be confined to conveyances only by which the land itself passes, for the design was, that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records.

If contradictions or incongruities exist between the preamble, and enacting clause of a statute, the latter shall prevail.

A cotemporaneous, unvarying construction of an act of Assembly, for sixty years, ought not to be disregarded but upon the most imperious and conclusive grounds.

APPEAL from *Harford* County Court. This was an action on the case for obstructing a way, whereto the plaintiff below (now appellee) claimed right by virtue of an instrument of writing under the hand and seal of one *Joshua S. Bond*. The declaration stated that on the 7th of October, 1820, at, &c. a certain *Joshua S. Bond*, being seized in his demesne as of fee of a certain close there situated, by his grant under his hand and seal, bearing date the day and year aforesaid, (which is now here shewn to the court) authorised the plaintiff to open and continue open a road through his the said *Joshua S. Bond's* field, to wit: The said close beginning at the end of the short lane near the house of the plaintiff, and intersecting the *Baltimore* road, near a chesnut tree; and the said *Joshua* thereby also authorised the plaintiff to keep in repair, and use a bridge, over the branch running through the said field. And the plaintiff also says that by the grant aforesaid, it was declared that the said road and bridge were intended as well for the use of the public at large, as for the use of the plaintiff, and that the said uses were to be enjoyed until the plaintiff and the said *Joshua S. Bond* should agree that the said road, intended to be opened as aforesaid, should be shut up or altered. And the plaintiff avers that afterwards, &c. he opened a road through the said close of the said *Joshua*, beginning at the end of the said short lane near his the plaintiff's house, and terminating, at, or near a chesnut tree, thus intersecting the road leading towards *Baltimore*, and continued to pass and repass over the said road with his servants and horses, &c. for a long space of time, to wit, at, &c. And he further avers that after the said road was opened, the citizens of this state passed and repassed over the said road. And the plaintiff further avers that after the said road had been by him opened as aforesaid, while the said grant was in full force and effect, and had not been determined nor any agreement made between the said *Joshua S. Bond*, and the plaintiff, by which the said road should be shut up or altered; the defendant well knowing the premises and disregarding the rights of the plaintiff, and intending to injure the plaintiff and deprive him of the use and benefit of the said way, to wit, on the 10th of August, 1823, and on divers other days and times, &c. obstructed the same road by placing, &c. and demolished the bridge across the same, &c. by means thereof, the plaintiff could not during the time aforesaid, have or enjoy his said way, as he of right ought to have done, to wit, at, &c. And the plaintiff further says, that he during the time aforesaid, being a public Inn keeper, was much damaged and injured in his trade and calling by divers citizens, as well travellers as others, during the said time being greatly obstructed and hindered in their passage to and from his said Inn, the said road herein before mentioned, then and there leading from or near his said Inn, to the said other road leading towards the city of *Baltimore*, to wit, at, &c. Wherefore the defendant (the appellant) pleaded not guilty, and issue was joined.

1. At the trial, the plaintiff called ***Francis A. Bond*** as a witness, who being examined by the defendant on the *voir dire*, stated that in case the plaintiff should recover in this cause, he considered he should be obliged to pay the defendant the amount of the verdict, damages and costs, as one of the heirs of *Buckler Bond*, who had conveyed with the covenants in the deed hereinafter inserted, the land over which the way in the declaration mentioned passes, to the defendant before the time stated of the trespass complained of, and that he was unwilling to testify in this case for the plaintiff. The defendant then prayed the court that the witness should not be compelled to testify for the plaintiff. But the court [*Hanson*, A. J.] directed the witness to be sworn; and he was sworn accordingly in chief. The defendant excepted.

2. The defendant further asked the witness *Francis A. Bond*, while on his *voir dire*, if in addition to the interest mentioned in the *first* bill of exceptions, he was or was not interested as the holder of a promissory note or acceptance, conditioned to be paid only after deducting the damages and costs in this case, that might be recovered from the defendant. But the court held that witness could not answer this question, inasmuch as the note spoken of was not produced. The defendant excepted.

3. The plaintiff then proved that the said *Joshua L. Bond*, mentioned in the declaration in this cause, was seized in fee of the land over which the said road passed; that the said *Bond*

gave to the plaintiff the following instrument of writing which was duly proved. "I hereby authorise *William Richardson* to open and continue open a road through my field, beginning at the end of the short lane near his house, and intersecting the present *Baltimore* road, at or near a chesnut tree, as also to build, keep in repair, and use a bridge over the branch in the field on which said road will pass, said road and bridge being intended as well for the public use, as the use of *Wm. Richardson*, and to continue until *William Richardson* and myself shall agree it shall be shut up or altered. Witness my hand and seal this 7th day of October, 1820. *Joshua S. Bond*, (Seal.)"

And that the plaintiff opened the said road and repaired the bridge in pursuance of the terms of the said instrument of writing, and used the same; and that the defendant on the 20th of August, 1823, obstructed the road aforesaid as stated in the declaration, and the plaintiff who was a tavern keeper by the obstruction aforesaid was with many others prevented from using the said way. The defendant then offered in evidence a deed duly acknowledged and recorded from said *Joshua S. Bond* and a certain *Buckler Bond*, conveying said land to defendant in fee; dated the 4th of June, 1823, which contained a covenant against all prior incumbrances and liens. And upon which deed there was a certificate of the delivery of seisin, to the defendant who further proved, that on the day on which the deed aforesaid was executed, that the said *Bond* delivered possession of the land mentioned in said deed to him. The defendant then prayed the court to direct the Jury, that the plaintiff was not entitled to recover, which direction the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before **Buchanan** Ch. J. and **Earle**, **Martin** and **Dorsey**, J.

Mitchell and R. Johnson, for the appellant, contended: 1. That the agreement of *Bond* with the plantiff was no grant, and could not be pleaded as such.

2. That if it was a license, it was determinable at the will of *Bond.*

3. That if not so, the remedy was against *Bond* only, and not against the defendant, who was a purchaser of the soil without notice of this claim.

4. That if it were a grant, it ought to have been recorded to take effect against the defendant, as a purchaser without notice.

5. That if it is to operate as a grant, or otherwise to confer an interest, it is a public road, for the obstruction of which no private action can lie in favor of the plaintiff.

6. That there is a variance between the contract proved, and that declared upon.

7. As to the first bill of exceptions, the witness was directly interested in the event of the suit, and the verdict would have been good evidence against him; aud, therefore, as a party interested could not be compelled to testisfy.

8. As to the *second* bill of exceptions, the question to the witness was proper, notwithstanding the non-production of the note. 1st. Because the note was not within the power of the defendant, nor in the possession of the plaintiff. 2d. because the question was on the *voir dire* to the interest of the witness alone.

1. The agreement was no grant to the plaintiff as he has pleaded it. He has declared on it, as a right of way to himself; whereas if it is a right of way, it is not to the plaintiff alone, but to the public as well as to the plaintiff. The way when opened, was a public way. 3 *Bac. Ab. tit. Grants,* (*G*) 387.

2. But it was not a grant at all; and if so it was determinable at the will of *Bond.* 4 *Bac. Ab. tit. Leases for years,* 178. *Bishop of Bath's Case,* 3 *Coke,* 35. There is no difference between grants and leases; and where a lease depends upon the will of both parties, it is at the will of either party. 2 *Blk. Com.* 146. 4 *Com. Dig. tit. Estute,* (*H*) 60, 63. Here *Bond* put an end to the right of way by his grant to the defendant. The plaintiff was to build and keep in repair a bridge; suppose he neglected to keep the bridge in repair, could *Bond* have compelled him to do so?

3 and 4. If it was a grant of a right of way, has the plaintiff any remedy against the defendant, without notice? There is no evidence to show, that the defendant had any notice of the grant, if it be one. It was not acknowledged or recorded, but was a voluntary transfer or grant without consideration. *Whitbeck vs. Cook*, 15 *Johns. Rep.* 487. *Kellogg vs. Ingersoll*, 2 *Mass. Rep.* 97.

5. There is no proof which can entitle the plaintiff to recover. The road was to be opened for the use of the public. It was a right of way for the public. There must be a particular right or a particular damage to the plaintiff to enable him to sustain the action. *Butler vs. Kent*, 19 *Johns. Rep.* 226. *Co. Litt.* 56. (*a.*) *Harrison vs. Parker*, 6 *East.* 152. Here no particular damage has been proved to have been sustained by the plaintiff.

6. There is a fatal variance between the contract proved and that declared upon. The license states, that the termination of the right of way was to be at the "intersecting the present *Baltimore* road *at or near a Chesnut tree.*" The declaration states it to be "intersecting the *Baltimore* road, *near a Chesnut tree.*" When a written instrument is pleaded with a profert, it must be recited verbatim. 3 *Stark. Evid.* 1587, 1588. 1 *Chitty's Plead.* 364. *Brook vs. Willet*, 2 *H. Blk.* 234. *Rogers vs. Allen*, 1 *Campb.* 315. (*note a.*) *Coryton vs. Lithebye*, 2 *Saund.* 113. (*note* 1.) *Mellor vs. Spateman*, 1 *Saund.* 346. (*note* 2.) *Esp. Evid.* 274, 275. *Doe vs. Calvert*, 2 *East.* 377. *Alban vs. Brownsall*, *Yelv.* 164. 1 *Hawk. Ch.* 76. 3 *Jacob's L. D.* 280.

7. On this point they referred to *Taney and Kemp*, 4 *Harr. & Johns.* 342. 2 *Stark. Evid.* 744, 747. 3 *Stark. Evid.* 1728, 1648. 1 *Stark. Evid.* 135. (*note.*) *The king vs. Inhabitants of Gisburne*, 15 *East.* 57. A distributee cannot be called as a witness to testify against the administrator of the estate in which the witness is interested, against his own consent.

8. On this point they referred to 1 *Stark. Evid.* 120. *Botham vs. Swingler*, *Peake's N. P. Cas.* 218. *S. C.* 1 *Esp. Rep.* 164. *Corking vs. Jarrard*, 1 *Campb.* 37. *Butcher's Company vs. Jones*, 1 *Esp. Rep.* 162. 2 *Stark. Evid.* 756. *Butler vs. Carver*, 2 *Stark. Rep.* 433. *The king vs. Inhabitants of Gisburne*, 15 *East.* 57.

Gill for the appellee, contended that the *first* bill of exceptions, presents the question, whether one can be made to testify against his will and interest in a civil action, not being a party thereto, and interested in fact to defeat the party relying on him. This question is settled by this court in the cases of *Taney vs. Kemp* and *The City Bank vs. Bateman.* The witness must testify.

The second bill of exceptions shews, an attempt, on the *voir dire* to give in evidence the contents of a written instrument, without producing it, or accounting for its absence—admitting this may be done where it would avail the party seeking such evidence; yet, in this case, the bills of exceptions referring to each other, the court must see that any benefit which the defendant could have had, from establishing an interest in the witness, on the *second* bill of exceptions, was within his reach on the *first* exception. The nature of the witness's interest, on both bills of exceptions, being the same, as it could not avail him on the first, he should not have attempted to raise the same question again. No injustice was done the defendant, for the question which he was seeking to raise by the *second* exception, had been previously decided, and in a shape too, to be reviewed by the appellate court. The second exception was wholly unnecessary; and, whatever may be the opinion of the court in relation thereto, it ought not to affect the cause.

The *third* bill of exceptions, covers the whole controversy, and the appellee contends: 1. That the deed from *Bond* to *Richardson* is a grant, or a binding and effectual contract, operating necessarily as a grant, to endure until the parties determine the rights secured by it, either by shutting up or altering the road mentioned in it. 3 *Bac. Ab. tit. Grant*, (F) 386, 387, (I) 393. *Shove vs. Pincke*, 5 *T. R.* 124. *Chatham vs. Williams*, 4 *East.* 475, 476. *Chester vs. Willan.* 2 *Saund.* 97. (*note* 1) 4 *Jacobs' Law Dict. tit. license*, 158. 2. That if not a grant, is it a covenant, that *Richardson* shall use the way. *Bac. Ab. tit. Covenant*, 62. 3. A covenant to enjoy a right of way, operates as a grant. 3 *Com. Dig. tit Chimin.* (D) 60. 4. It is a private way, the public using it, and the sale of the land, over which the way passes, after the grant, do not determine *Richardson's* right. *Allen vs. Ormond*, 8 *East.* 4. 4 *Jacobs' L. D.* 158. 3 *Cruse, Dig. tit. Way*, 115, *sec.* 22. 1 *Bac. Ab. tit. Authority*, (P) 321. 3 *Stark. Evid.* 1680, (*note* 1.) 5. The road mentioned in *Bond's* grant is not a public highway. In this State, public highways are only created according to legislative authority, and no indictment would lie for a nuisance on this road. It results from these positions, that *Richardson* had a right of way secured to him by *Bond's* grant, which still existed at the time of the obstruction complained of. It is admitted, that the special damage laid was not proved; but the bill of exceptions admit an obstruction to *Richardson's* private way, if it exist in point of l w, and this was sufficient proof to enable the jury to find for the plaintiff, disregarding the special damage, and of course authorised the County Court, to refuse the defendant's prayer.

6. In this case, notice of the existence of the way, is to be presumed in *Hays*, he being a purchaser subsequent to the opening of the road. *Whitbeck vs. Cook*, 15 *Johns. Rep.* 483. 7. The covenant of *Bond* to *Hays*, that the former was seized and had power to convey without incumbrance, is not broken by the fact, that a right of way existed over the land to which the covenant referred. A right of way is a mere easement. It does not diminish the *interest* of the vendee in law. 3 *Cruse*, 110. *Whitbeck vs. Cook*, 15 *Johns. Rep.* 483. 8. The sale of the land does not determine the right of way; for the grantor after the execution of his deed, cannot lawfully do any act to prejudice the rights of his grantee. *Jackson vs. Aldrich*, 13 *Johns. Rep.* 106. *Allan vs. Ormond*, 8 *East.* 4.

It has been contended that the deed from *Bond* to *Richardson*, is a grant which ought to have been recorded to take effect against the defendant, a purchaser without notice. This position is relied upon to reverse the refusal of the County Court, to instruct the Jury that the plaintiff was not entitled to recover. If the position is correct, the judgment of the court below is erroneous. It is denied that the defendant is a purchaser without notice. His deed shews an unusual and remarkable circumstance, that the ancient ceremony of livery of seisin was actually performed in this case; long before this, the road had been opened and used. The existence of the road was palpable to the defendant when he took actual possession. In addition to this, upon the authority *Whitbeck* and *Cook* before cited, he is presumed to have notice of a road existing and used before his purchase. If then, notice to the defendant can affect this cause favorably to the plaintiff, the defendant had both actual and constructive notice of the existence of the road, when he accepted his deed for the land over which it passed. It is however conceded that if our acts of Assembly require this grant of way to be recorded, then it is void in a court of law, and the plaintiff cannot recover.

The only acts upon the subject, are those of 1715, ch. 47, and 1766, ch. 14., and it is supposed that neither reach this case. That the act of 1715 does not for this plain reason, that the 8th section, which requires deeds to be recorded, relates to deeds of "bargain and sale only." It declares that no manor lands, tenements or hereditaments whatsoever, shall pass, alter or change from one to another, whereby the estate of inheritance or freehold or for above seven years shall be made or take effect in any person or persons, or any use thereof to be made by reason of *any bargain and sale only*, except the deed or conveyance by which the same shall be intended to pass, should be made by writing, indented, and sealed, &c.

The construction of this act has always confined it to deeds of bargain and sale—See preamble to act 1766, ch. 14. Other assurances were not within its operation—the grant in question is not a deed of that character—there is no consideration moving from *Richardson* the grantee to *Bond* the grantor. It wants that leading distinctive characteristic of a deed of bargain and sale.

The next inquiry is whether the act of 1766 affects the plaintiff. It enacts that no "estate of inheritance or freehold, or any declaration or limitation of use or any estate for above seven years shall pass or take effect, except the deed or conveyance, by which the same shall be intended to pass, shall be acknowledged in the county where the lands, tenements or hereditaments do lie and also be enrolled," &c. This act applies to all forms of assurances, and the only inquiry is, whether the subject matter of this conveyance is referred to in the act. It is clearly not an estate of inheritance, nor a freehold—nor a declaration or limitation of a use. These are legal technical terms, which do not apply to this grant. The only enquiry now is, whether any estate, and if any, whether one for above seven years, is created by this grant? The term estate is significant of interest—in wills it is said to include the whole interest—in this act of Assembly associated as it is, with estates of inheritance, freehold, uses, terms for years, it refers to estates, in which as in the other cases, the grantee has an exclusive interest. Now so far from the grantee having an exclusive interest, nothing is more familiar, than an interest in one, and a mere right of way in another, an easement without any possessory right or remedy. In this case the thing granted to *Richardson*, is a right of way in gross. He could not alienate nor sell. It was in effect a mere privilege valuable because of its consequences, but unquestionably having no direct tendency to increase his estate. This most significant term estate, is applied to inheritances, freeholds and terms for years—and is as particularly indicative of a valuable interest in one case as in another—the terms "estates for years" have always been applied to leases—and carry with them inseparably the idea of a valuable vendible interest in the grantee. In the enacting clause of the act of 1766, the language differs from the same clause in the act of 1715. The latter declares that "no manor lands, tenements or hereditaments shall pass"—which the former declares that "no estate of inheritance, freehold or use or for above seven years shall pass"—why this distinction in the language, entirely of a technical cast, if the legislature did not take and adopt the known difference between a privilege, and an interest? The preamble of the act of 1766, declares also that "a general registry of all deeds and conveyances of *land* would secure creditors, &c." This confirms our views, and sustains the opinion of the court below.

Dorsey, J. delivered the opinion of the court at this term.

The only question arising on the first bill of exceptions is, were the court below, right, in compelling a witness to give testimony, which might subject him to a civil action or pecuniary loss, when offered by the party against whom, his interest would prompt him to testify? On this subject, we have no doubt, since the decisions of this court, in the cases of *Taney vs. Kemp*, and *the City Bank of Baltimore vs. Bateman.* In Maryland, the rule of law is settled, that no person who is called as a witness, (not being a party to the suit) can refuse to give testimony on the ground, that he may thereby become liable to a civil action, not of a penal nature, or sustain pecuniary loss, or that the verdict may be used as evidence against him, in some other civil proceeding then pending, or which may thereafter be instituted. Of the opinion of the County Court on this point in the cause, we entirely approve, but we cannot concur with them, in the decision they have given in the second bill of exceptions. It is wisely settled agreeably to the suggestions of public justice and expedience, that a witness on the *voir dire* may by the party objecting to his examination in chief, for the purpose of shewing his interest, be called on to state the contents of written instruments, which are not produced, and the reason assigned is, that the party objecting could not know previously, that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection. For authorities on this subject, *vide* 1 *Stark. Ev.* 120. 2 *Stark. Ev.* 756, and the cases there referred to. In the third bill of exceptions is involved a question of much greater difficulty and doubt. If the instrument of writing given by *Bond* to the appellee, be considered a grant of an easement or right of way, (as according to law and the apparent intent of the parties, it may be, if viewed without reference to our acts of registration) then it becomes necessary to examine what is the character of the interest transferred, and how far it is a subject operated on, by the act of Assembly of 1715, *ch.* 47, entitled an act for quieting possessions, enrolling conveyances, and securing the estates of purchasers." It has been urged that the right transferred, is nothing more than a tenancy at will. But such a construction is not warranted by the terms of the contract. It is not a demise, or conveyance to continue, in the appropriate phraseology of such tenures "*quamdiu ambobus partibus placuerit*," and which, by the unambiguous terms of its creation, must expire as soon as its continuance ceases to be the will of both parties; but it is a grant whose duration is not to terminate until the will of both parties unites for its discontinuance. In the language of the agreement, it is to continue until *Richardson and Bond shall agree, it shall be shut up or altered. Bond's* determination alone, therefore, as evidenced by his conveyance to the appellant, is not a happening of the contingency on which the estate was made to depend. It is unnecessary to determine whether this easement was to expire with the life of *Richardson*, or to remain after his death for the use of the public; in either event, enrollment is necessary, if the subject matter of conveyance be such as is contemplated by either of the aforementioned acts of Assembly. The title of the first act of Assembly distinctly sets out its object, viz: the "quieting possessions, enrolling conveyances, and securing the estates of purchasers;" and for the accomplishment of that most desirable end, the 8th section provides that "no manors, lands *tenements or hereditaments whatever*, within this province, shall pass, alter or change, from one to another, whereby the state of inheritance or freehold, or any estate for above seven years shall be made or take effect in any person or persons, or any use thereof to be made, by reason of any bargain and sale only, except the deed or conveyance by which the same shall be intended to pass, alter or change, be made by writing, indented and sealed, and the same be acknowledged in the provincial court, or before one justice thereof, or in the County Court, or before two of the justices of the same, where such manors, lands, tenements, or hereditaments lie, and enrolled within six months after the date of such writing indented as aforesaid." The first enquiry to be disposed of is, whether the estate or right designed to be transferred by the grant, be an hereditament, (as that is the most comprehensive term, including both lands and tenements.) In 2 *Bla. Com. p.* 20, an incorporeal hereditament is defined to be "a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same," which incorporeal hereditaments, the learned commentator states in the succeding page, "are principally of ten sorts, advowsons, tithes, commons, ways, offices, dignities, franchises, corrodies or pensions, annuities and rents," and in page 35 of the same book, it is said "a fourth species of incorporeal hereditaments is that of ways, or the right of going over another man's ground. This may be grounded on a special permission, as when the owner of the land, grants to another the liberty of passing over his grounds, to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone, it dies with the person." These references will suffice to show, that the way in question, is an hereditament. Is it then such an hereditament as the act of 1715 can operate on? is the next question to be considered. That act of Assembly, as appears by the preamble to the act of 1766, is only applicable to such conveyances as operate by way of bargain and sale, and it is superfluous perhaps to say, that in all our legislation upon the subject of enrollment of deeds, where "hereditaments" are spoken of, they are such as attach or relate to realty, not to personalty. If the deed from *Bond* to *Richardson* had been for the transfer of a right of way in *esse*, there can be no doubt, but that it would pass by deed of bargain and sale; and that for the legal transfer of such an interest by deed of bargain and sale, all the solemnities required by the act of 1715, must have been pursued. But such is not the case before us; it is an attempt to transfer, not a way already in *esse*, but a way *de novo*, which may be done by grant or lease; but cannot be effected by way of bargain and sale. As authorities to that effect, see *Beaudley vs. Brook*, *Cro. Jus.* 189. 1 *Ba. Abr.* 468, *tit. Bargain and Sale, letter B, and Shep. Touch.* 226, and the cases there cited. It is assuredly no disrespect to the Legislature of 1715 to suppose, that at the time of their passage of the law referred to, they may not have recollected this technical, subtle distinction, between the mode of transferring rents and ways in *esse*, and *de novo*, and they may therefore have acted under the impression, that their act, chapter 47, affected the one in the same manner that it did the other. But, whether they did, or did not labor under this misconception of the law, according to our view of the rational, liberal construction, that ought to be given to acts of the Legislature, upon such subjects as the present is wholly immaterial.

Experience having shown, according to the preamble to the act of Assembly of November session, 1766, chapter 14, "that the good end and purposes of the said act (meaning the act of 1715) are now in a great measure eluded by the frequent use of conveyances by feoffment, lease and release, limitation, and declaration of uses, and other modes of conveying; and whereas a general registry of all deeds and conveyances of land, would very much tend to the security of creditors and purchasers, the preservation of titles, and thereby, to the advancement of the value of real estates, and particularly, to prevent abuses and deceits, by mortgages, and the purchase of pretended titles;" the Legislature enacted "that after the first day of May next, (1767) no estate of inheritance or freehold, or any declaration or limitation of a use, or any estate for above seven years, shall pass or take effect, except the deed or conveyance by which the same shall be intended to pass or take effect, shall be acknowledged in the provincial court, or before one of the Justices thereof, in the county court, or before two justices of the same county, where the lands, tenements, or hereditaments conveyed by such deed or conveyance do lie." It has been urged, that as the preamble to the act of 1766 speaks merely of a general registry of deeds or conveyances of "land," that no recording is required by it, but of deeds or conveyances, by which the land itself passes; and that this construction is strongly supported by the words of the enacting clause, which requires the deed to be recorded in the county where the lands, tenements, or hereditaments do lie; and the clerks to keep books in which the deeds are to be registered, and alphabetted in the name of the parties thereto, with the name of the land and quantity of acres. But these suggestions appear much more technical and critical than substantial. Both acts of Assembly being in *pari materia*, must be construed together as one system. The first law having embraced incorporeal tenements and hereditaments, ingenuity itself cannot insinuate a reason why they should not be included in the second. To confine that act of 1766 to conveyances only, by which the land itself passes, is utterly subversive of that complete system of enrollment, manifestly designed to be established; is inconsistent with that part of its preamble, which sets out the moving inducement to legislate on the subject to be, to remedy the evil, that the act of 1715 extends only to conveyances of lands, tenements and hereditaments, by way of bargain and sale only, and that other modes of conveyance (meaning by necessary implication of lands, tenements and hereditaments,) had been frequently used to the elusion of the good ends and purposes of that law; and is also inconsistent with that part of the preamble, which declares as the objects of the Legislature in adopting a general registry, to be "the security of creditors and purchasers, the preservation of titles, and thereby the advancement of the value of real estates." If contradictions, or incongruities exist between the preamble and enacting clause of a statute, the latter shall prevail. There is, however, no such contradiction or incongruity, in the act in question; construe the word "of" before the word "land," to mean *concerning* or *relating to* (meanings of which it is susceptible, and not unfrequently bears) and perfect harmony is at once restored. By no rule of interpretation can the force of the words "tenements or hereditaments" be evaded, or their introduction into the enacting clause be accounted for, consistently with this confined exposition attempted to be imposed on the act of 1766. As to the stress which has been laid upon the words "do lie," to prove that they can relate to lands only (as incorporeal hereditaments, it is said cannot be alleged to lie any where) it appears to be a construction too subtle, not to say hypercritical to have entered into the consideration of the Legislature in passing the law. Nor are we aware that it would be an unwarrantable invasion of the rules of grammar, of the import of terms, or the licensed figures of speech, to say, that a right of way lies in a county where it exists and is exercisable. As to the alphabet to be kept by the clerk, with the entries to be made of the name of the land, and number of acres, those requisites are applicable to the transaction, as important, and necessary to the public in recording a deed transferring an incorporeal hereditament concerning land, as if it had been a conveyance of the land itself. If this cramped interpretation of the act of 1766 were to prevail, by no possible deed of conveyance in *pais* could the husband and wife uniting, grant a rent charge or right of way, on the lands of the *feme*, so as to bind her or her heirs after the death of her husband, and the public, and the profession, would learn with astonishment at this day, that notwithstanding our system of general registry—a grant of a rent charge *de novo*, equal to the whole value of the land on which it attaches, and rights of way, estovers, &c. to any supposable extent, may be legally created, without any entry thereof appearing on the public records; but if a rent charge or right of way in *esse* be conveyed by bargain and sale (the usual mode of conveyance) then all the solemnities of acknowledgment, registration, &c. are required. *Cui bono?* It adds nothing to the security of creditors or purchasers of land, or the preservation of their titles, because such enrollment furnishes them no means of ascertaining the existence of the conveyances. The alphabets discloses not the name of any person, as a party to such conveyance, who ever owned the land, nor in your application to the Clerk of the Land Records, can you inform him in whose name the search is to be made. It is a matter of minor importance to creditors or purchasers, to whom a rent charge is payable, (they are rarely for any length of time left uninformed upon that subject) but it is a matter of vital importance to them to know, whether there be a rent charge or not. In the registry of deeds, therefore, it is an object of ten times more importance "to the security of creditors and purchasers, the preservation of titles, and the advancement of the value of real estates" that a record should be made of *de novo* rent charges, and incumbrances on land, than of those in *esse*. The former are always sought for, and might be easily found by creditors and purchasers, whilst the latter are rarely if ever sought for, and could not be found, but by reference to every deed recorded in the Land Records, since the date of the patent of the tract of land, into the title of which the examination may be made.

We are aware that it has been ruled in England, that a license to use a beneficial privilege upon the land of another is *no estate or interest* in the land, and notwithstanding the statute of frauds may be granted without writing. In the case of *Wood vs. Lake*, *Say.* 3, it was decided that a parol agreement for liberty to stack coals upon the land for seven years, and to have the sole use of that part of the close upon which the liberty to stack coals was given, is neither an estate or interest in or out of land. According to this decision, if *A* by parol for valuable consideration agree that *B* may stack coals upon his lands for ninety-nine years, renewable for ever; and that *B* and his assigns during that period, have the sole use of the lands, such agreement is unaffected by the statute of frauds, and though operative to the full extent of its terms, transfers no estate or interest in the lands. Yet in the leading case of *Crosby vs. Wadworth*, 6 *East.* 602, a parol sale of a standing crop of mowing grass then growing, was held to be within the statute as being *an interest in the land.* In *Wood vs. Lake* the judges rely on the case of *Webb vs. Paternoster*, reported in *Palmer*, 71, and *Popham*, 151. Where a parol license to stack hay upon land was held a charge upon it, in whosoever hands it might come; but say the court, it is countermandable unless a time certain is fixed for its enjoyment, "as if I license one to dig clay in my land." This case let it be remembered, was before the statute of frauds; and therefore could be no warrant for the decision in *Wood vs. Lake.* In fact the only question which could have arisen in *Webb vs. Paternoster*, as to the necessity of *writing* to the transfer of such an interest, as that attempted to be created, must have been on the old principle of the common law; that an incorporeal right could only pass by deed. But if the opinions of the court in that case are to govern cases since the statute of frauds, are we prepared to go the length to which those opinions must carry us? To determine that a parol license to dig clay in land, is the same as the privilege to stack hay on it; but gives no interest in the land, though a charge upon it into whosoever hands it may come. Or to illustrate the principle still further, that an oral license to dig coal or iron oar in mines for five hundred years, and agreeably to the case of *Wood vs. Lake*, to have also the sole use of the land, in which the mines are situated during that period, passes the right intended to be conferred, and charges the land therewith, is unaffected by the statute of frauds, and *yet* creates no lease, estate, or interest in the land. It cannot be denied that the case of *Wood vs. Lake*, has in England been followed by subsequent adjudications. As late as the year 1818, in *Taylor v s. Water*, 7 *Taunt.* 384, *Gibbs* chief justice of the *Common Pleas*, states that a license to enjoy a beneficial privilege on land may be granted without deed, and notwithstanding the statute frauds without writing." It is a license not an interest in the land." But these decisions are irreconcilable with the opinion of *Lord Ellenborough* in *Fentiman vs. Smith*, 4 *East.* 107, where the defendant having orally granted permission to the plaintiff to pass water to his mill by means of a tunnel over defendant's land; who assisted in making the tunnel, but afterwards obstructed the water, in an action brought on account thereof, it was decided that "the title to have the water flowing in the tunnel over the defendant's land could not pass by a parol license without deed." *Sugden* too in his law of Vendors, page 57, attacks the case of *Wood vs. Lake* with great effect, and pronounces it "to be in the very teeth of the statute, which extends generally, to all leases, *estates, or interests.*" In *Thompson vs. Gregory*, 4 *John.* 81, the *Supreme Court* of *New York*, (of which *Kent*, and *Spencer* were members) determined that a right to overflow the land of another, by the erection of a mill dam, was an incorporeal hereditament, which could be transferred by deed only, and not by parol permission to use it; and if it were otherwise that the assignment of such an interest, since the statute of frauds must be in writing.

With such strong reasons and high authority for questioning the soundness of the principles adjudicated in *Wood vs. Lake*, and subsequent cases which have followed it, we feel no disposition for the sake of analogy to give a similar interpretation to our act of Assembly of 1766, regulating the execution and enrollment of conveyances of real property, to that given in *Wood vs. Lake* to the statute of frauds. The language of its provisions comprehends the privilege attempted to be conferred by the instrument before us, and the policy of the law, the interests and convenience of the public, forbid that we should restrict its operation. In no other way can the leading object of the legislature, the "securing the estates of purchasers" be effected; their design was, that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records. If parol or unrecorded licenses of the character of that in controversy were tolerated, frauds and losses upon purchasers would be innumerable as may readily be imagined. A man might pay and receive a deed with all the solemnities of law, and covenants which could be devised (short of a general warranty which is rarely given) for a hundred acres or more of valuable meadow land, without the knowledge of the semblance of a right in any one by which its value could be imagined; on the next day he may learn that his purchase is a mockery; that his neighbour under an oral license, from some remote proprietor of the property purchased, (of which the vendor was ignorant) is about to inundate every foot of it by the erection of a mill-dam below, his remedy can no where be had. But suppose it were even admitted, that the principles established in *Wood vs. Lake*, and the cases bottomed upon it, stand free from all exception, it is humbly conceived that the case now under consideration is clearly distinguishable from them. The statute of frauds on the construction of which they arose, speaks only of estates or interests *into or out of lands*, whilst our act of Assembly embraces estates in lands, *tenements* or *hereditaments*, and if it be conceded, as it must be, that the right of way in question is an "hereditament," it surely would be stretching technicality to the verge of quibbling, to say that the right which one has in an "hereditament" is not his "estate" in it.

If we entertained even strong doubts as to what originally should have been the construction of this act of Assembly (of which we have none) they would in a moment be removed by adverting to the single fact, which the whole land records of the State will demonstrate, that from the year 1767 to the present day, grants and conveyances of *de novo* rent charges, rights of way, &c. have been as uniformly acknowledged and recorded, as deeds conveying the land itself. This contemporaneous unvarying construction of the act of Assembly for sixty years, ought not to be disregarded, but upon the most imperious and conclusive grounds. If there be error in it "*communis error facit jus.*" We are sensible that we have given just cause of complaint at the unusual length in which this subject has been treated, but the deep interest felt in it by every landholder in the State must be our apology.

We concur in the opinion given by the County Court in the first bill of exceptions, but think their opinions in the second and third are erroneous, and therefore

JUDGMENT REVERSED.

(*Note.*) The decision of the court of *King's Bench* in *Hewlins vs. Shipman*, 5 *Barn. and Cres.* 221, has been met with since writing the above opinion, by which it appears that the cases of *Webb vs. Paternoster*, *Wood vs. Lake*, and *Taylor vs. Waters*, have been so shaken, that they may be considered as virtually over-ruled, so far as regards the granting of easements by parol.

CHARLES C. EGERTON, *et al.* *vs.* THOMAS B. REILLY AND WIFE.—December, 1829.

A complainant filed an exception to an answer, and the County Court without deciding upon it, referred the case to the Auditor, who stated an account, rejecting a credit claimed by the defendant's answer; to this, exceptions were also filed, and over-ruled, and the account ratified. Upon appeal, *it was held*, that the County Court had acted prematurely, that after the exceptions to the answer had been decided on, the case should have been set down for argument on bill and answer, or a replication to the answer put in, and an opportunity afforded to the respondent, to make out his defence, by proof.

APPEAL from an order of *Saint Mary's* County Court, sitting as a Court of Chancery, confirming the report of the auditor of that court. The bill filed on the 9th of August, 1824, by the complainants, (now appellees,) stated, that *H. G. S. Key*, one of the defendants, was indebted to the complainant *Rebecca Reilly* before her marriage in the sum of $266.65; that the defendant, *Charles C. Egerton*, was in the habit of supplying her with such articles as she required (he, the said *Egerton*, being a merchant, residing in said county,) and that she was likewise in the habit, occasionally, of making small purchases of the Messrs. *Shemwells*, likewise merchants of the said county. That for the purpose of securing them, and giving the said *Rebecca*, a further credit with the said *Egerton*, she agreed to give him a control over the debt, due her as aforesaid from the said *Key*, with the express understanding that the sums then due the said *Egerton* and *Shemwells* should be paid, by said *Egerton*, out of said debt, and the balance held subject to the order of said *Rebecca*, in pursuance of said understanding, the said *Rebecca* gave to the said *Egerton* an order, dated the 29th of April, 1822, on said *Key* for said debt, which was accepted, he, the said *Key*, being aware of the said understanding. That *Key* afterwards gave his single bill to *Egerton* for the amount, who thereupon brought suit and recovered judgment. That *Egerton* has paid no part of the debts, which according to the foregoing understanding he was to have paid out of the money due from *Key*, nor did he give the credit to the said *Rebecca* which he stipulated to do; but they charge, that combining with *Josiah* and *Philip Turner*, also defendants, and intending to defraud the complainants of said debt, and convert the same to his use, and the use of the said *Josiah* and *Philip*, he had assigned to them the whole of said judgment, when in fact the complainants who have intermarried, are the equitable owners of all that may be due thereon, after satisfying the purposes for which it was placed in the hands of *Egerton*, which it is much more than sufficient to do. *Prayer*, that an account may be stated between the said *Egerton*, and complainants, and that the aforesaid judgment may be decreed them, and in the meantime that an injunction may issue against all the parties restraining the payment of the money. Injunctions and subpœnas issued.

The answer of *Egerton* admits that *Rebecca*, before her intermarriage was in the habit of getting family supplies from the firm of *Egerton and Pike*, of which he was a member, for her own *use*, and also, as he alleges, for her mother's family, and also, as he believes, from the *Messrs. Shemwells*, and that she gave the draft on *H. G. S. Key*, as stated, for which he gave his single bill. That this single bill was put in suit, and before judgment was obtained, he assigned the same to *Josiah and Philip Turner;* but he alleges, that the assignment was made for a valuable consideration, being on account of a heavy amount due from him to them; he states, that at the judgment court, he was asked by *Key* if he wanted the money, but upon telling him that he had assigned the claim to the *Turners*, he *Key*, applied to *Josiah* who was present, and an arrangement for a settlement was made between them; that he, this defendant, still owes the *Turners* a considerable balance. He admits, that at the time the draft was given, it was understood, that the dealings of said *Rebecca*, with *Egerton* and *Pike*, were to be paid out of it, and avers that several other claims, amongst others, one due from one *F. P. Key*, were also to be paid, as well as the claim against her individually, which deducted from the amount of the said draft, would only leave a balance of $38.91, which is all he justly owes them. He denies, that at the time the note of *Key* was executed, there was any understanding, that he should hold the balance which might remain of the same, for the use of complainants, but states the understanding to have been, that he defendant, was to be individually answerable for any such balance. He denies any agreement to settle *Shemwells* claim, and all fraud, &c.

The answers of *Josiah* and *Philip Turner* state, that *Key's* note was assigned to them, by *Egerton* whilst in *suit*. That the assignment was made for a valuable consideration, and that a heavy balance is still due them from *Egerton.* They deny all knowledge of the alleged understanding between the complainants, or either of them and *Egerton*, and of their dealing, except having heard *Egerton* say, he might owe a small balance on the transaction. The defendant, *Josiah Turner*, states, that at the judgment court, *Key* acknowledged the justice of the claim, and after judgment asked for indulgence, which was granted on certain terms then agreed upon.

The answer of *Key*, admits the debt, and denying all fraud, &c. says he is ready to pay the money as the court may direct.

At May term, 1825, the complainants filed exceptions to the answer of *Egerton*, upon the ground that the attempt to charge them with a debt due from *F. P. Key* was made without any memorandum or note signed by either of them, or any other person, by them authorized to that effect.

At August term, 1825, the court referred the case to the auditor, with directions to state an account, which was accordingly stated, and reported to the following March term. At that term, the defendants excepted to the said report of the auditor, upon the ground, that he had not given them credit for the amount of the claim spoken of in the answer of *Egerton*, as due him from *F. P. Key*, but the court over-ruled the said exception, and ordered that said report be ratified and confirmed.

From which order, the defendants appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE and DORSEY, J.

A. C. Magruder for the appellants.

This case was not in a situation to be sent to the auditor. The complainants had not put in a general replication, nor set it down upon bill and answer. If it was intended to put in a replication, an opportunity ought to have been given to the defendants to establish their case by proof. If it was to be considered as being before the court, upon bill and answer, then the matters set forth in the answers, being admitted to be true, the complainants clearly had no case.

No counsel appeared for the appellees.

Earle, J. delivered the opinion of the Court.

However the decision in this case in itself may be viewed, it was certainly premature, and in this the equity jurisdiction below, committed an error.

Before the exceptions to one of the answers was disposed of, the court passed an order, directing the auditor to state an account of the amount of the debt due to the complainants, after deducting the debts due from the complainants to the defendant, *Egerton*, including the item for postage, according to the terms of the order filed in the cause; and subsequently ratified and confirmed the auditor's report and statement thereon, excepted to by the defendants.

The exceptions to the answer being decided on, the case should have been set down for argument on bill and answer, or a replication to the answers put in, and an opportunity afforded to the respondents to make out their defence by proof.

The real object of the order of the 29th April, 1822, and the transaction growing out of it, might then have been understood, and if *Egerton's* right to apply a part of it to the discharge of *Francis P. Key's* account had not been substantiated by evidence, the auditor's report rejecting it would have been free of exception, and the case of *Egerton* so far properly settled against him.

An opportunity to the *Turners* would also have been offered to shew, that their connexion with the transaction of the assignment of *Key's* single bill, was fair and *bona fide*, and that the same was made to them for a valuable consideration, and without notice of any trust and confidence between *Rebecca Key* and *Egerton*, in relation to the debt due from *H. G. S. Key* to her.

We reverse the order confirming the auditor's report, that the case may still take this course in *Saint Mary's* County Court, and what appertains to equity and justice may yet be done between these two parties in that tribunal.

Order reversed; and adjudged, ordered and decreed by the Court of Appeals, that the order of *Saint Mary's* County Court, as a Court of Equity, confirming the report of the auditor, be, and the same is hereby reversed and annulled, and that the said court proceed in the cause, so that equity and justice may be done to the parties. Further adjudged, that the appellees pay the appellants their costs on this appeal.

MILLER, EX'R of BEARD *vs.* NEGRO CHARLES.— December, 1829.

By a devise in the following words, viz. "likewise my negro man *Charles* to be free on the 1st day of January, 1827, on condition that he pay the sum of ten dollars annually, to my before named sister M, so long as *he* lives;" it was the intention of the testator, who died in 1825, that the slave mentioned in the devise should be free on the 1st January, 1827; and it could not have been his intention that the condition mentioned, should have been performed by *Charles*, precedent to that day, as the acts to be done consist of payments to be made by him annually, as long as he may live.

Upon a petition for freedom by a negro claiming his right to manumission, under a last will and testament, against the executor of his deceased master, the parties agreed upon a statement of facts, which did not disclose whether the testator left assets sufficient for the payment of his debts or not; *held* that the objection to the manumission arising from the insufficiency of assets was not before the court.

APPEAL from *Anne Arundel* County Court. This was a petition for freedom filed in *Anne Arundel* County Court, on the 10th of March, 1828. The following statement of facts was submitted for the opinion of the Court.

It is admitted in this cause, that the said negro *Charles* was the slave of *John W. Beard*, the appellant's testator; that the said *John W. Beard* died in October, 1825, having first duly made and executed his last will and testament, which is recorded in the Orphan's Court of *Anne Arundel* County; in which last will and testament, is contained, the following clause, "likewise," my negro man *Charles* to be free, on the first day of January one thousand eight hundred and twenty-seven, on condition that he the said *Charles*, pay the sum of ten dollars annually to my before named sister, *Mary Glover*, so long as he lives. It is also admitted that the negro *Charles*, the petitioner, and the negro *Charles* mentioned in the said clause, are one and the same person, and that he was, at the death of the said *John W. Beard*, and on the first of January, 1827, under the age of forty-five years, and able to gain a sufficient livelyhood and maintenance; and it is also admitted, that the said negro *Charles* paid to the said *Mary Glover*, the sum of ten dollars in January, 1828, agreeably to the annexed receipt marked A, for the year 1827. It is further admitted, that at the death of the said *Wesley Beard*, and also at the time of the payment of the said ten dollars, the said *Mary Glover* was a *feme covert*. And it is further admitted, that the said negro *Charles* was held as a slave by the personal representative of the said *John W. Beard*, from the death of the said *John W. Beard* till the first of January, 1827.

The County Court rendered judgment on the case stated in favour of the petitioner, and the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN and ARCHER, J.

Speed, for the appellant, contended, 1. The act of 1796, *ch.* 67, *sec.* 13, gives no power to will negroes free on condition, and the court will infer no such power.

2. This is a condition *precedent*, and as such repugnant, and impossible to be performed; and therefore the condition and bequest both fall.

3. But suppose the condition to be a condition *subsequent*, and consequently not impossible to be performed, yet the court will not sustain the bequest.

4. If the court give judgment of freedom, it must be of unqualified freedom, and the intention of the testator is defeated; for it was clearly his intention, that the petitioner should not be free, unless the terms imposed on him by the bequest could be legally and faithfully complied with.

5. The petitioner does not state, nor is it admitted in the case stated, that there were other assets, sufficient to discharge all the debts of the deceased.

On the *first* point, he referred to the act of 1796, *ch.* 67, *sec.* 13. *Hamilton vs. Craggs*, 6 *Harr. & Johns.* 17. *Burroughs vs. Negro Ann*, 4 *Harr. & Johns.* 262. On the *second*, he cited 1 *Thomas's Coke Litt.* 14. 2 *Ib.* 19—22 (note *M.*) 2 *Blk. Com.* 166. *Shep. T.* 129, 130. On the *fifth* he cited 2 *Johns. Rep.* 243.

Brewer, Jr. for the appellee, referred to *Co. Litt.* 274. *b.* 1 *Hen. & Munf.* Act of 1692, *ch.* 52. 1752, *ch.* 1.

EARLE, J. delivered the opinion of the Court.

This cause was decided in *Anne Arundel* County Court, upon facts agreed on, and stated between the parties. The statement briefly represents *Charles's* right to freedom under the will of his deceased master, *John W. Beard*, and points to and sets out the particular clause by which he claims it. What is the true meaning of the testator in this clause seems to have been the sole question submitted to that court, and can alone have our attention in revising their decision. We concur with the Judges in thinking that *John W. Beard* intended that *Charles* should be a free man on the first day of January, 1827; it could not have been his intention that the condition mentioned, should have been performed by *Charles* precedent to that day, as the acts to be done consist of payments to be made by him annually, as long as he may live.

Considered as a condition to be performed subsequent to freedom, it presents a question upon which we need not give an opinion, as it is one in which the executor can have no interest.

The subject of assets insisted on in the argument, is not before us, and we shall express no opinion, in relation to it. If it deeply concerns the executor, we can only say, that he has had ample time to understand his situation as to assets, and to take legal steps for his security.

We affirm the judgement of *Anne Arundel* County Court.

Burch, *et al.* *vs.* Scott.—*December*, 1829.

A bill was filed in June, 1823, and the usual process of *subpœna* and attachment issued, which were served on the defendant, from term to term, until March, 1824. He failing to appear, the Chancellor passed an order to take the bill *pro confesso*, which was also served on the defendant the 1st of May following. The cause was then proceeded in to final decree in August, 1825, and a *fieri facias* issued, returnable to December term, 1825, at which term the original defendant with others alleged to be interested in the decree, filed a bill to have the execution countermanded, the decree opened, and an answer of the defendant to the first bill accepted. The grounds of this application were, that the claim was unfounded, that proper parties were not originally made, and that the defendant had been prevented by the omissions of his counsel prior to June, 1824, and by accident in the transmission of his answer since that time, from putting in his answer as he designed and intended. Upon this the Chancellor countermanded the execution, and after answers were filed controverting this application, rescinded the decree of August, 1825, and all proceedings subsequent to July, 1824. *Upon appeal it was held*, not to be consistent with the salutary exercise of that sound discretion which the Court of Chancery possesses, to open or discharge the enrollment, and vacate the decree in this case, for the purpose of enabling the defendant to make his defence.

A decree of the Court of Chancery is to be considered and taken as enrolled, when it is signed by the Chancellor, and filed by the register, and the term has elapsed during which it was made.

Appeal from the Court of Chancery. On the 14th of June, 1823, the appellants filed their bill against the appellee, upon which an *injunction* and *subpœna* issued, and were served to September term, 1823, when the defendant not appearing, an attachment issued against him, and he was returned attached to December term, 1823. The attachment was renewed, and the defendant was returned attached to March term, 1824. On the 30th of March, 1824, an order was passed to take the bill *pro confesso*, *&c.* A service of this order on the defendant, was proved on the 1st of May, 1824. At March term, 1825, commissions issued to take testimony, which were returned to July term, 1825. On the 4th of August, 1825, the case was referred to the auditor, who on the same day made his report, when the Chancellor decreed accordingly. On the 25th of September, the complainants petitioned for a writ of *fieri facias*, to levy the amount of the sum of money decreed to be paid to them by the defendant, which was thereupon ordered, and issued returnable to September term, 1825. It was renewed to December term, 1825. Afterwards, and at the same term (December 1825,) the defendant, with *Berry*, *Gittings* and others, filed in the said cause a bill, (stated in the record to be a bill of review,) reciting the substance of the bill of the complainants of the 14th of July, 1823, and the proceedings thereon, and certain proceedings in the Orphan's Court in the *District of Columbia*, and in *Montgomery* County, and in the Court of Appeals, between the intestate of the complainants and the intestate of the defendant in their respective lives, and between the intestate of the complainants and the defendant (see 6 *Harr. & Johns.* 67,) and certain proceedings of the defendant as administrator of *K. Gittings*, his intestate, in the course of which proceedings, the defendant, after being served with the injunction and *subpœna* in this case, (which was before September, 1823,) "lost no time to apply to his counsel, *W. Jones*, Esquire, to draw his answer, and pursue the necessary steps to determine the controversy speedily and finally; but that owing to the residence of the counsel out of the State, his not being a regular practitioner of the court, and his various professional avocations, the said *Scott* was frequently and contrary to his anticipations and expectations, disappointed in having the business put in train for a decision. That he at length became so anxious and uneasy on the subject, that hearing of his said counsel being in attendance at the Court of Appeals in *Annapolis*, at the June term, 1824, he came from his home in *Montgomery* County to *Annapolis*, for the express purpose of having an interview with him, and getting the answer drawn and filed. That he found his counsel on the eve of returning to *Washington*, whither he accompanied him, and immediately on their arrival, the answer was drawn and regularly sworn to, and put into the hands of his counsel to be transmitted by the stage next morning to the register of the court. That said *Scott* had frequently interviews afterwards with his counsel on the subject, and he, as well as his counsel, took it for granted the answer and exhibit had been duly received; and he was informed by his counsel, that he had made an arrangement with *Mr. Key*, one of the opposite counsel, who resided in *Georgetown*, to fix upon some day convenient for them both to go to *Annapolis*, and argue the cause. And that said *Scott* remained under this impression without the slightest intimation of the answer's having miscarried, until he found that there had been a decree against him, followed by execution. And when he communicated to his counsel the facts of his property having been seized by the sheriff, he was utterly at a loss to comprehend how it could have been brought about; *having only heard a short time before of the miscarriage of the answer*, and not dreaming that there could have been a decree, till writing to the register of the court for information, he was certified of the fact." These complainants then by their bill complain, that the decree had been obtained by surprise and fraud on the part of the complainants therein, (the appellants) and contrary to their own knowledge of right and conscience; that the complainants, the *Gittings's*, are the children and distributees of *Kinsey Gittings*, on whose estate the complainant *Scott* administered; that *Scott* is only a trustee, and they the parties really interested, and ought to have been made parties by the appellants in their bill; that the decree is altogether fraudulent both against *Scott* and the *Gittings's;* inasmuch as by fraud and concealment, the appellants obtained a decree for more than was due, (if ever any thing was due,) having concealed sett off's and deductions which they had always admitted; and as against *Scott*, by like fraud and concealment, have charged him with a sum exceeding what he had received and was accountable for. That *Scott's* said answer, which by some unforeseen and inevitable accident had miscarried as aforesaid, presented a just and substantial defence, and that the miscarriage and loss of said answer has been discovered and known to *Scott* since the said decree, and not before, and the other complainants were totally ignorant that *Scott* had failed to put in his answer. The bill then objects to the order and proceedings of the Chancellor, and the returns and proceedings of the commissioners, and states certain errors therein for which *Scott* has brought this his bill, in the nature of a bill of review, to review, revise, &c. and prays for himself and the other complainants, that the said decree and proceedings may be reviewed and reversed, and that the appellants may answer the premises; and that *Scott* may be allowed to put in his original answer, plea, &c. to said original bill, and the other complainants allowed as well as *Scott* to appear to the said bill, and answer and defend the same upon the original merits, unprejudiced by said decree; that the said cause may be heard upon all and singular the allegations, matters and things, in this their supplemental bill in the nature of a bill of review alleged and maintained, at the same time that it is reheard upon the said original bill; that the complainants may be restored to their original situation before the decree; that the said decree may be opened for such rehearing; that the execution thereof may be suspended, and the writ of *fieri facias* countermanded; and praying publication against the defendants therein, &c. Accompanying this bill was an affidavit from the counsel, *Mr. Jones*, stating the drawing of the answer in *Washington* with a plea in the bar and a demurrer to the equity of the original bill which was sworn to and returned to him to be transmitted to the register in Chancery; that finding the package so large as to make the transmission of it by the mail very expensive, he sent his servant to the stage office to inquire whether there were any passengers for *Annapolis* in the stage of the next day, who returned with answer that he had found a gentleman who would take charge of the package; upon which he delivered it to his servant, very securely sealed up and directed to the register of the Court of Chancery in *Annapolis*, with a note requesting him to file the answer, and enter a notice to dissolve the injunction. He does not recollect that the servant named the person to whom he delivered the package; upon questioning him lately, he thinks he did not know his name, and has forgotten it if he did. That he had frequent conversations afterwards with Mr. *Key* about appointing a day to go to *Annapolis* and argue the cause, after he had informed him that he had put in the answer. He *rested* without the least doubt or apprehension of the answer's being regularly filed, and does not remember when he experienced so great surprise as when he heard of the bill and decree.

Upon this bill and affidavit, the Chancellor by his order of the 16th of November, 1825, suspended and countermanded the execution, and all further proceedings under the decree. At December term, 1825, *Scott* filed an answer to the appellants original bill against him, with sundry exhibits of certain proceedings of the former controversy, in the life of *K. Gittings*, in the Orphan's Court of the *District of Columbia*, which it is unnecessary to state. Afterwards, at the next term (March, 1826) the appellants appeared and filed their answers with sundry exhibits, to the bill of *Scott*, *Berry*, *Gittings* and others, in which they aver and state the justice of the original claim, for which the decree had been obtained; the proceedings in the former suit, &c. the justness and fairness of the decree, denying the allegations of the bill, and refering to the proof taken of *Scott's* own acknowledgments of the justice of the claim and that he held the money to be paid, whenever the cause should be determined, to the appellants. The answers state the allowance of certain credits, and that they were endorsed on the *fieri facias*, and deny the justice of the others claimed by *Scott*. That the order for taking the bill, *pro confesso*, was served on *Scott* before the 20th of June, 1824. They admit that their counsel was informed, that *Scott's* answer was filed; and that they are informed and believe, their said counsel thereupon wrote to *Annapolis* for a copy of it, and was informed that none was filed, which information he shortly afterwards communicated to *Mr. Jones*. They charge, that the same fact was again, afterwards, communicated to *Mr. Jones*, after a considerable interval, and they believe was also communicated to *Scott*. They expressly charge, and state they are prepared to prove that *Scott* had such information before the decree. They deny all fraud in obtaining the decree, and deny that there ought to have been any surprize on the part of *Scott*, who is charged as desirous to delay his answer, as long as he safely could.

Afterwards, at the same term, (March, 1826,) the appellants filed their petition, praying the Chancellor to revoke his order of suspension of the 16th of November, 1825. And on a rule to show cause on the 25th of July, 1826, the Chancellor passed the following order.

Bland, Chancellor, (July term, 1826.) This case standing ready for hearing on the notice given in pursuance of the order of the 4th of May last, to show cause why the order of the 16th of November last, should not be dissolved and revoked, the counsel of both parties were heard and the proceedings read and considered.

The Chancellor feels every disposition to relieve this case from all embarrassing forms, and to reach its merits if practicable. It will, therefore, be necessary to disengage the complainants substantial equity and object, from the forms with which they have been clothed; and to examine their bill with a due regard to their equity and object. The substance of their complaint is, that a decree has been obtained against some, which materially affects all of them, erroneously—by fraud—by surprise; or, to say the least, improperly and to the exclusion of a good and available defence. And upon the truth of these allegations they ground their equity to have the decree of the 4th of August last set aside—their defence let in, and the matters in controversy heard upon the merits. This is the object, and the mode chosen by them to attain it is, by what they call "a supplemental bill in the nature of a bill of review." Whatever may be the cause of complaint, the party asking relief must conform, at least in substance, to prescribed rules as to time and manner.

It has been the long established usage and law of the Court of Chancery to consider all its orders, and decrees, as completely within its control, and open to be altered, revised or revoked, during the whole term at which they are passed, on motion or by petition. But, if the term is suffered to elapse, the party can only obtain relief by bill of review. This law of this court is analogous to that which has been adopted by the courts of common law; and which has been found alike salutary in both. It is believed there is no decision of the Court of Appeals which has directly or distinctly restricted or altered this rule of the Court of Chancery. But in this case the bill of these plaintiffs was not filed until long after the close of the term at which the decree was signed. It cannot, therefore, be considered as entitled to the same indulgence, or as standing altogether on the footing of a petition for a rehearing, or alteration, or opening of a decree, filed during the term at which the decree was signed.

This bill charges, that the decree of the 4th of August last was obtained by fraud. It is the peculiar province of this court to grant relief in all cases against fraud and accident, not within reach of the courts of common law. And there can be no case, of that description, in which it would be more fit and proper for it to interfere than upon a charge, that its own decree had been obtained by fraud. Such a case is, however, brought before the court, not by a bill of *review*, but by an *original* bill. And in that light, the allegations of this bill require the court, in some respects, to consider it.

In the Court of Chancery of *England*, the Chancellor, it seems, after the hearing, pronounces the substance of his decree orally, minutes of which are taken down by the register, who afterwards draws them out into the form of a decretal order; and, if in doing so, any mistake should occur, the execution of the order may be stayed a while; until it can be corrected by motion in court. As thus drawn up, this judgment of the court is always called its "decretal order." But it has the force only of an interlocutory order; and is not a perfect, complete, and final decree before enrollment; for till then the Chancellor may rehear, alter, or reverse it. The proper officer draws up the form of the decree of enrollment, from the decretal order, reciting all the pleadings, &c. after which a fair copy is made upon parchment and signed by the Chancellor. It is then, and not until then, an enrolled and final decree. The interval of time suffered to elapse between the making of the decretal order, and the enrollment, is seldom less than a month, often more, and in some cases exceeds a whole year. But in this interval the decretal order is so far considered as a final decree that it may be enforced by attachment.

The Court of Appeals of this State have declared, that the decree of the Chancellor is subject to his control, only upon a bill of review, or a bill in the nature of a bill of review. A bill of review lies after the decree is signed and enrolled. A bill in the nature of a bill of review lies after the decree is made, but before enrollment. *A decree must be considered as enrolled, after it is signed by the Chancellor and filed by the register.* But the Chancellor rarely, if ever, pronounces his decree orally, as in *England*, or if he does do so in any case, no minutes of it are taken down. He is considered as having pronounced no judgment; nor as having made any decision in the cause until a decree is drawn up in writing, in full and proper form and signed by him. That decretal order, which, in *England*, always precedes the enrolled or final decree is never made here, and is unknown to our practice. But in *England* the phrase "decretal order," is often applied to various other orders beside that which immediately precedes the decree; and it is sometimes applied in the same sense here.

The plaintiffs have stiled this bill, "their supplemental bill in the nature of a bill of review." But, one of them was the *defendant*, and the others were no parties to the original bill; and it is attached, as an addition, to no other bill; nor does it purport to supply the defects of any original bill. It is, therefore, in no sense a *supplemental bill.*

In *England*, a bill of review can only come in after the decree has been perfected and enrolled. But if the party discover any error, or new matter of fact after the decree has been pronounced, and before it has been enrolled, he may obtain relief by *a bill in the nature of a bill of review;* and need not wait or go to the expense of having the decree enrolled. Now, from what the Court of Appeals have said, as we have seen, it clearly follows, that in this State, there can be no such thing as *a bill in the nature of a bill of review:* Since all decrees here are made by being signed and filed; and when so made are to be considered as decrees enrolled. Most clearly such a bill cannot be resorted to in this case.

A bill of review, properly so called, lies *against* those who were parties to the original bill, and *against them only;* and must be either for error apparent on the face of the decree, or for some new matter. But, before a bill of review for newly discovered matter can be filed, the party must petition for leave to do so: setting forth the new matter, strongly sustaining his statement by affidavits; upon which the leave of the court is granted. In this case there has been no petition setting forth newly discovered matter, nor any leave given to file such a bill. This bill, therefore, can, in no respect whatever, be considered as a bill of review grounded on the discovery of new matter.

A bill of review for error apparent on the face of the decree may be filed without asking or obtaining the leave of the court; and it may be brought *by* either of the parties to the original bill alone; or it may be filed *by* a person not a party to the original decree, but whose rights are injured by it. Such is the case now before this court. The bill of these plaintiffs has this character, and more.

This bill has yet another aspect. It alleges, that the plaintiffs, one of whom was a party to the original suit, had a good and available defence; that all of them should have been made parties; that they have, all of them, an interest which they will be able to maintain and prove; and that the decree of the 4th of August last was obtained by surprise, or owing to a kind of negligence for which they are not at all blamable, or for which they may, at least, be excused. Upon these grounds they pray to have the decree opened and the cause reheard. According to the *English* authorities, if the enrollment of a decree be obtained by surprise or irregularity, it may be opened; provided, the application be made within reasonable time. And where the merits of the case had not been entered into, an enrolled decree has been set aside, upon the special circumstances, notwithstanding the proceedings were strictly regular. For a court of justice will make every effort, when in its power, to reach the merits of the case, and have justice done.

This bill, then, divested of all extraneous matter may be regarded in three distinct characters. *First*, as an original bill to have the decree of the 4th of August last reversed on the ground of fraud. *Secondly*, as a bill of review for error apparent on the face of the decree, and because it injuriously affects the interests of some of the complainants who were not parties to it; and *Thirdly*, as a bill, grounded on the peculiar circumstances, asking to have the decree by default set aside, and the case reheard upon the merits.

It was in these characters, that it presented itself to the mind of the Chancellor when it was first laid before him. He then felt, as he still does, a strong impression, that these characters were so entirely incompatible, as to be incapable of being blended together in the same bill; but he conceived, that if it could be sustained in all, or any of them, the parties complaining would be entitled to relief. And under this impression it seemed to him fit and proper to suspend, at least for a season, the execution of the decree, until those matters could be more carefully canvassed, and both parties could be heard. And therefore it was, that he passed the order of the 16th of November last; which operated as an injunction, and was intended so to operate.

But, in the course of the argument, the one party seemed to construe this order as a total revocation of the decree of the 4th of August last; and the other, as a mere stay of execution, because of some credits not having been given. It was also urged, that the allowing of such a bill of review to be filed, did of itself operate as a suspension of all further proceedings, until the final hearing; and that it must be so understood, when taken in connexion with the prayer of the bill, and the circumstance of a bond having been required and accepted. The Chancellor has been misunderstood.

According to the *English* law, neither the filing of a petition for rehearing; nor a bill in the nature of a bill of review, nor a bill of review for error apparent on the face of the decree; nor a bill of review for new matter after leave given; nor an original bill to set aside a decree on the ground of fraud; nor a bill to open an enrolled decree and let in the merits, has ever or under any circumstances been considered, *in itself*, as a suspension of the execution of a decree. The party having the decree, in all such cases, is allowed to proceed, unless specially and expressly restrained; which is never done but on the sum decreed being brought into court, or on good security being given. Similar law and practice has been long established here; and, hence it was, that the Chancellor required a bond with approved security to be filed, before he imposed the restriction or injunction, expressed in the order of the 16th of November last.

If, on considering this bill in its *third* character, there should be found sufficient cause for opening the decree, and having the case reheard upon its merits, it will be most advantageous to all parties, that it should be done: and it will be unnecessary to inquire, and express an opinion, whether the three characters of this bill are not incompatible; particularly as no objection to it has been made on that ground; or whether the decree has been obtained by fraud or not; or is erroneous upon its face. The decree of the 4th of August last, now complained of, was obtained in that suit by the default of the defendant in not filing his answer within the time prescribed by the rules of the court. This apparent negligence, the present plaintiffs, by their bill, have endeavoured to account for—to justify, or to excuse. And whether they have done so or not, is the matter now to be ascertained; if they have, this decree must be opened.

The decree was signed as of July term; and, as has been observed before, all decrees and orders of the court being held entirely subject to its control during the term, if an answer had come in at any time, previous to the close of that term, the decree by default would have been set aside, and the defence let in. No decree by default, under the rule, will be signed until after the first four days of the term; but after that an answer may be filed, and the decree rescinded, at any time during the term. On turning to the proceedings in the original case, it appears, that there had been a return against *Scott*, the defendant, attached for not appearing; in consequence of which, on the 30th of March, 1824, the usual order *nisi* was passed, requiring him to appear and answer by the 4th day of the next July term, which commenced on the 13th, and closed on the 24th of the same month. Therefore, at any time after the 17th of July, 1824, the parties might have obtained the decree which was signed on the 4th of August, 1825.

That they did not obtain it sooner can only be imputed to their own misunderstanding, negligence, or indulgence; because, the court, on application, would have inspected the proceedings, and have done on the next day, after that day, precisely that which it did, when called upon one year after. The plaintiffs in that case then, owing to their own negligence or indulgence, stood in no better situation at the July term, 1825, than they did at the July term, 1824; because, their decree by default, according to the established practice, was liable to be corrected or revoked during the term at which it was signed. The July term, 1825, commenced on the 12th of that month, and was not finally closed until the 17th of August following. Consequently, the decree was not final and absolute until that day. After which it could only be opened or affected by an original bill, or a bill of review. The bill to set aside this decree was not filed until the 15th of November, 1825; and *Scott*, one of the plaintiffs here, was not charged, on the record of the original case, with a default, which might have been fixed upon him by a decree, until the 18th of July, 1824, making a space of about fifteen months of apparent negligence, which is to be accounted for, justified, or excused. To find which, we must examine the bill and answer in this case.

That the defendant *Scott*, in the month of July, 1824, and before he could have been finally fixed with a decree by default, had made an answer, which was ready to be put on file; that he had charged his solicitor with the care of it; who had attempted to forward it to the register, to be put on file, are facts proven and not denied. It also appears, that under a firm belief, that his answer had reached its destination, and was on file, his solicitor proposed to the solicitor of the plaintiffs to agree upon some day when the cause should be argued by them. The defendant, in this case, *Thomas Burch*, in his answer, states, that thereupon his conusel wrote for a copy of *Scott's* answer, and was informed, that it had not been filed; which information was shortly afterwards communicated to *Scott's* counsel, which after a considerable interval was again mentioned to him. And it is expressly charged, that *Scott himself*, knew the fact before the decree was signed. That *Scott's* solicitor was very negligent is most manifest. But it does not clearly appear, that *Scott himself*, is chargeable with negligence to a greater extent than about four or five months; for it is not said by *Burch* in his answer, how long it was, before the date of the decree, that *Scott* was informed his answer had not been filed; but it would seem, that the counsel of the plaintiffs in that case, to be assured of the fact whether *Scott's* answer was filed or not, inquired for it, and searched the papers so late as about the 1st of July, 1825.

It is admitted by the defendants in this case, that the decree of the 4th of August last is for a greater amount than it ought to have been given for; in this respect, therefore, it confessedly requires revision and correction. It is a decree by default, and not upon the merits. But *Scott* avers upon oath, that he has a good defence against the whole claim of the defendants, which he prays to have let in. And it is not alleged by his opponents, that they have lost, or been deprived of any means of sustaining their pretensions. In short, under all the peculiar circumstances of this case, it appears to be fit and proper, that the decree of the 4th of August last should be revoked; but it must be upon the terms of paying all costs.—*Decreed*, that the decree of this court passed and signed on the 4th of August, 1825, in the case wherein *Thomas Burch*, administrator *de bonis non* of *Jesse Burch*, *Fielder Burch* and others are plaintiffs, against *William Scott*, together with all the proceedings in the said suit subsequent to the fourth day of July term, 1824, be revoked, rescinded, and annulled.—*Decreed* also, that the said *Scott* forthwith pay unto the said complainants all the costs which they may have incurred in the prosecution of the said suit subsequent to the fourth day of July term, 1824, to be taxed by the register—*Decreed* also, that the answer of the said *Scott*, purporting to have been received and filed on the 7th of December, 1825, in the said case, be allowed to be filed as his answer in the said suit, subject to all legal exceptions thereto.

From this decree, the complainants in the original case, appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN and ARCHER, J.

F. S. Key for the appellants. The Chancellor has considered the bill of the appellee as having three aspects, under all, or some of which he is entitled to the relief prayed. "*First*—as an original bill to have the decree of the 4th of August, 1825, reversed on the ground of fraud. *Secondly*—as a bill of review for error apparent on the face of the decree; and because it injuriously affected the interests of some of the complainants who were not parties to it; and *Thirdly*—as a bill grounded on the peculiar circumstances, to have the decree by default set aside, and the case reheard upon its merits." It is chiefly upon this latter ground that the Chancellor seems to grant the relief.

On the part of the appellants he contended, that considering the bill in all or either of these aspects, this decree is erroneous. *First*, "as an original bill."—1. The bill itself presents no case for relief; and, 2. If it did, the answer denies every thing that would make it a case for such relief. The answer denies all fraud or surprise, and charges that both *Scott* and his solicitor were informed of the answer's not being on file, some time before the final decree. It also denies the averment of merits as to the original controversy, and exhibits (which is conclusive of that subject) a copy of the decree in the case of *Burch* against *Gittings* in the Orphan's Court of the County of *Washington*, in the District of *Columbia*, which was never appealed from, and settled the question of right as to the negroes, which *Scott* afterwards sold as *Gittings'* administrator—the price of which, it was the object of the appellants' original bill to recover from *Scott*. The deposition of *Brightwell* also shows *Scott's* own acknowledgment that he had no merits. Considering the bill in this aspect, the Chancellor's decree is on bill and answer, and the answer was to be taken as true.

Secondly, "as a bill of review for error apparent on the face of the decree; and because it affected the interest of some of the complainants who were not parties to it." There is no error on the face of the decree, and none such is pointed out in the bill; also its affecting the interest of some of the complainants who were not parties to it, could not entitle Scott, and much less the others who were not parties, to file a bill of review.

Thirdly, "as a bill grounded on peculiar circumstances," &c. There can be no such bill; the decree of the 4th of August, 1828, was only subject to the Chancellor's control, by rehearing, during the term at which it was signed, by a bill in the nature of a bill of review; and after the term, only by a bill of review.

In his argument he cited *Cooper's Plead.* 95, 97, 98. *Hollingsworth vs. M'Donald*, 2 *Harr. and Johns.* 237. *The act of Assembly*, 1820, *ch.* 161. *sec.* 1, 2, 3. *Marine Insurance Company*, vs. *Hodgson*, 7 *Cranch*, 336. *Henck vs. Todhunter, et al.* 7 *Harr. and Johns.* 275. *Munnikhuysen vs. Dorsett*, 2 *Harr. and Gill*, 374. 2 *Johns. Dig.* 327. *Pinkney vs. Dowson*, 4 *Taunt.* 779. *Avery vs. Petten*, 7 *Johns. ch. Rep.* 211. *Cameron vs. M'Roberts*, 3 *Wheat.* 591.

Jones for the appellee. The only possible complaint that can be made by the appellants in this case is that of delay; and they have themselves been guilty of great delay. No injury will result, except that of delay until the merits are decided on.

1. As to the nature of the new bill—Whether it is to be considered as a bill of review. Even if the decree upon it has set aside the former degree on a ground which may not be tenable; yet if there were other reasons which might justify the decree, they will prevail. It is not the reasons of the Chancellor which this court are bound by; but if the decree was proper, then it is no consequence what reasons for it are assigned. The bill (called a bill of review) goes upon two grounds—one that the proceedings against the now appellee were irregular, and the other surprise, &c. A party may pray alternative grounds of relief in the same bill. It is matter of little consequence what the bill is called. A supplemental bill, it is admitted, can only be filed by a complainant in the original bill.

2. As to a decree in paper, and a decree enrolled. If the decree is enrolled, it may be reversed by a bill of review, or on an appeal, or for new discovered evidence, or error in law. But where the decree is in paper it may be reviewed, revoked, &c. on petition for a rehearing, or by bill of review, &c. A decree is never enrolled until the suit is finally disposed of. Where it is not enrolled it may be opened on motion. The courts now on all accasions proceed by way of motion—rule to show cause, &c. It is substituted in the place of an *audita querela*, and writ of error *coram nobis*. It has been the practice in our courts to set aside a judgment after the term has elapsed. *Jackson vs. Union Bank of Maryland*, 6 *Harr. & Johns.* 151, 152 (*note.*) *Gover, et al. lessee vs. Cooley*, 1 *Harr. & Gill*, 7. It is not the expiration of the term, but the enrollment of the decree. When is the decree made an unalterable record? So long as the enrollment of the decree is suspended, it may be re-examined. What is the enrollment of a decree? It is a record of the whole proceedings in the case. A judgment enrolled is a record of the whole proceedings, and so also is the enrollment of a decree—not separated from the proceedings. *Newl. Ch. Pr.* 191, *sec.* 3. *Wiser vs. Blackly*, 2 *Johns. Ch. Rep.* 488. If the decree is enrolled at the end of the term, it is equally so the moment it is filed with the register. No other act is to be done at the end of the term than when filing the decree. *Bennet vs. Winter*, 2 *Johns. Ch. Rep.* 205. By the act of 1817, *Ch.* 119, *sec.* 9, no decree, or the proceedings upon which it may be founded, is required to be enrolled or recorded, unless it affects real estate or brings it into question.

3. As to the different natures of bills and petitions for rehearing, &c. *Mitf. Plead.* 34, 84, 85. 2 *Madd. ch.* 464, 465, 537. *Wooster vs. Woodhull*, 1 *Johns. Ch. Rep.* 539. *Cooper's Plead.* 88, 99. *Ridgely vs. Carey*, 4 *Harr. & McHen.* 167. *Griffith vs. Pennington*, in the late Court of Appeals, November, 1795, (*M. S.*)

4. As to the regularity of the proceedings previous to the first decree. He referred to the acts of 1799, *Ch.* 79, and 1820, *Ch.* 161, and stated that the proceedings in the original case were

under the former, instead of the latter act, if indeed they were under either act; that if the proceedings were under the act of 1799, *ch.* 79, there was no authority to issue a commission to one commissioner to take testimony.

Magruder in reply. The defendant in the original case, was in contempt for not appearing—no fault was found against him for not doing so, it being optional with him to appear or not; but not appearing, he was attached. Still he did not appear, so that the decree against him was regular with his entire consent. But it has been said, that the proceedings were not warranted by the acts of 1799, *ch.* 79; and 1820, *ch.* 161. This court is not now sitting on an appeal from that irregularity, if any. If the defendant in that case was aggrieved by the decree, he should have appealed from it. This he did not chose to do. The act of 1820, *ch.* 161, was intended to expedite suits in the Court of Chancery, and to prevent delays therein. There can be no bill of review, where the party asking for the review, has never appeared in court. *Cooper's Plead.* 88, 90. Where a bill of review is allowed, the party filing it must have first complied with the decree. *Williams vs. Mellish*, 1 *Vernon*, 117. *Wiser vs. Blackly*, 2 *Johns. ch. Rep.* 491. If the bill is to impeach the decree for fraud, then the regular mode is pointed out in *Cooper's Plead.* 96; but it is not such a decree as is mentioned in *Milf. Plead.* 85. The Chancellor in this case, does not decide that the bill could be filed on the ground of fraud; but, he sets aside the decree, under the peculiar circumstances of the case. *Newl.* 190, sums up all the old cases, and there is no instance of a proceeding like this. The application is always to strike out the enrollment of the decree. *Wiser vs. Blackly*, 2 *Johns. ch. Rep.* 490. *Newl.* 191. The case of *Hollingsworth vs. McDonald*, 2 *Harr. and Johns.* 237, settles the question when a decree is to be considered as enrolled. In this court in *Lyles vs. Lyles*, 6 *Harr. and Johns.* 273, at a subsequent term, a motion was made to amend the judgment of affirmance, by giving additional damages by way of interest, but it was refused. Where the courts will amend or strike out a judgment, under the peculiar circumstances of the case, or the nature of the action, he referred the court to *Jackson vs. Union Bank of Maryland*, 6 *Harr. and Johns.* 151. (*note*) *Gover, et al. Lessee vs. Cooley*, 1 *Harr. and Gill*, 7. *The Palmyra*, 12 *Wheat.* 8. *Hudson vs. Guestier*, 1 *Cranch*, 1. *Cameron vs. McRoberts*, 3 *Wheat.* 591. The original decree in this case was upon the merits, and not by default. The practice of our Court of Chancery is founded principally upon our acts of Assembly, and it is very rarely that the *English* practice is resorted to. *Hodges vs. Davis*, 4 *Hen. and Munf.* 400. There can be no relief in equity, where it could have been obtained at law. *Contee vs. Cooke*, 2 *Harr. and Johns.* 179. Why should the decree be opened for the want of proper parties? No person is bound by a decree to which he was not a party. If the defendants considered that all the proper parties were not before the court, a bill of interpleader should have been filed. *Mitf. Plead.* 47. A bill of review may be brought at any time within twenty years after the decree. An appeal from a decree must be made within nine months; and if the party is ever so much aggrieved, his right to appeal, after the nine months have elapsed, is gone. If the present bill of review is sustained, then the party will be permitted to lay by for near twenty years and then file his bill of review, which, as in this case, is no more than an appeal from a decree regularly passed in the case.

Jones for the appellee, (with the leave of the court) in answer to some points suggested by the counsel of the appellants in reply, and not adverted to in the opening. 1. It has been objected by the appellants counsel, that before the allowance of this bill as a bill of *review*, or in nature of a bill of *review*, the decree should have been actually *complied* with, by payment of the money decreed, or bringing it into court; or else a compliance excused by swearing to his inability, want of assets, &c. *Answer*, 1. This is prescribed by no positive rule of law, but depends upon the *discretion* of the Chancellor, or the rules of *practice* established in the court, at the discretion of the Chancellor. In the *English* Chancery the rules of court, at one time, required a preliminary performance of the decree, even to the payment of money, if the decree were merely pecuniary. Now the performance of the decree, if it go to any collateral act, is still required; but if it go merely to the payment of *money*, the practice is to require either *actual payment*, or *security* for the payment, at the discretion of the Chancellor. 2 *Madd. Ch.* 539. (2d *Ed.*) where this alternative of the payment of the money or giving security is expressly stated, and precedent cited. In this case, the Chancellor, in the exercise of a sound discretion, required *security* only for the payment of the money, in case the defendants should be cast at the final hearing on the merits; and *security*, approved by him, has been given. *Answer*, 2. The terms to be imposed upon a party seeking the review, are entirely a matter of discretion with the Chancellor; there is no fixed rule of law. Great latitude is allowed in adapting the terms to the circumstances of each case. Then no interlocutory order of the Chancellor, in the exercise of this discretion, is examinable on appeal, any more than the admission or refusal of a plea; the setting aside or refusing to set aside a judgment by default, &c. All of which are decided by this court to be without its cognizance as an appellate court. *Jackson vs. Union Bank of Maryland*, 6 *Harr. and Johns.* 151 (*note.*) *Gover*, *et al. Lessee vs. Cooley*, 1 *Harr. and Gill*, 7. *Answer*, 3. A fair exception to the rule is presented in this case. The defendant was charged in the original suit as administrator of *Gittings* for property that came to *his* hands as assets; and as such, regularly inventoried, appraised and disposed of; and he swears that a great part of it is uncollected; and a great part of what he has collected, has been forced out of his hands, both before and since the decree, by the creditors of *Gittings.*

2. It has also been objected by the appellants' counsel, that the errors in the proceedings and decree, upon the original bill, are not cognizable by this court, for want of an appeal directly from that decree, taken by the original defendant. *Answer*—But for errors of law apparent on the face of the proceedings, a bill of review is the appropriate and specific remedy, and such a bill is just as admissible in the Court of Chancery of this State as in any other, and is so recognized in the practice of that court, and by this court in *Hollingsworth vs. M'Donald*, 2 *Harr. and*

Johns. 237. The limitation, by statute, of the time in which *appeals* may be taken, has nothing to do with bills of review; and can, by no possibility, be construed into an implied abolition of the practice. The two remedies are specifically different in their nature—the one calls for a re-examination of the decree upon all the grounds both of *law* and *fact*,—the other of law only; and the views of policy and convenience that restrict the right of appeal at large, extend not to the modified revision of decrees for manifest errors of law. The appeal from the Chancellor's order setting aside the original decree, necessarily and directly brings before this court the regularity and legality of that decree, and the proceedings that conducted to it; for if there be such manifest errors, the order setting aside the decree (no matter upon what specific and declared reason in the argument of the Chancellor) is completely justified, and must be affirmed.

3. It has also been objected, that it is no question on a bill of review whether the *proof* be sufficient, but whether there be any error of law apparent on the face of the proceeding; or in other words, that a bill of review lies for manifest error of *law*, and not for errors of *fact*. This is admitted without hesitation or qualification. But all our objections to the decree proceed upon manifest errors of *law*, and not of *fact*. All the departures from the provisions and *formula* of the statute by which alone an *exparte* decree, by default, can possibly be justified in this case, are purely matters of law: for instance, the issuing of a commission without a previous "*interlocutory decree*," under the act of 1820, *ch.* 161; the direction of it to only *one* commissioner, under the act of 1799, *ch.* 79; the mode of executing the commission under either act—involving the irregularities in the mode of swearing or affirming the witnesses, the want of their signatures to their depositions; and above all, the omission of *notice* of the time and place of opening and executing the commission. Not one of these irregularities come at all under the description of errors of fact, or rest at all upon the sufficiency of *proof*. The only point of evidence at all connected with them is the *admissibility* of the evidence, not the deductions of fact

from it; and its admissibility turns entirely upon the regularity and legality of the proceeding by which it is introduced, and presents a pure question of law.

4. The terms "*interlocutory decree*," used in the *first* and *second sections* of the act of 1820, *ch.* 161, are construed by the counsel of the appellants to mean a mere interlocutory *order* for a *commission*. Now this interpretation is wholly inconsistent, both with the terms, *per se*, and with the context of the act. *Ex vi termini*, a *decree* is very different from a mere *order*. When the term *order* is applied to any proceeding which decrees any relief under the bill, it is qualified as a *decretal* order, to distinguish it from mere interlocutory orders in general. A *decree* in a cause, *ex vi termini*, imports either a decree for relief, or a dismission of the bill. An "*interlocutory decree*" means precisely the same thing; except that it is not, in the first instance absolute, but depends on a future contingency to make it so; and is often called a decree *nisi*. The "interlocutory decree," here spoken of, clearly means a decree for relief to be made absolute, or to be vacated on a future contingency—such as the appearance and answer, or the continued default of the defendant. In the mean time the commission issues; and by that means the complainant is enabled to proceed with the preparation of his cause for a final hearing, in case the decree should be vacated and issue joined. In entering this interlocutory decree for relief, the act of 1820, *ch.* 161, dispenses with the usual preliminary of such decrees—the taking the bill *pro confesso*, which can be done only on the terms prescribed by the *second section*. The sort of decree here intended is precisely that usually passed by a court of equity, upon a bill taken *pro confesso; i. e.* a decree *nisi*. This is still more clear from the *context*; for in the *first section* the commission is made a progressive and superadded step to the "interlocutory decree;" both the one and the other are to be done. It would be strange if they were one and identical. In the *second section* this same "interlocutory decree" is still insisted on as the preliminary to the order for taking the bill *pro confesso*. It would be still more strange if this last order, intended for the express purpose of *dispensing* with a com-

mission, and all extraneous evidence whatever, is, nevertheless, to be preceded and accompanied by the very thing dispensed with! The argument of the counsel of the appellants, to show that they had an election to proceed under either act of Assembly—that of 1799, *ch.* 79, or 1820, *ch.* 161; the one being supposed to apply to cases where the defendant had stood out to an *attachment*, and the other to cases where the process had gone no further than a summons, and, therefore, that the two laws are consistent, and each operates upon its appropriate cases, is deemed to be clearly untenable. 1. If the two acts could be thus construed distributively as applicable to these two descriptions of cases, each must operate *exclusively* upon the cases respectively appropriated to it. The provisions applicable to the case of a mere *summons* could not be applied to and confounded with a case where the party stood out process of contempt. The court is not authorised to follow up these proceedings indiscriminately, in all cases of default, but is expressly authorized and *required* to apply the requisite proceeding to the given case. Therefore there cannot be, under any construction of these acts of Assembly, an *election* to pursue the one or the other course—the precise course being prescribed and limited to the specific case. 2. But, the two acts of Assembly cannot stand together; the latter act virtually supersedes and abrogates the former. It is true it speaks only of cases where the defendant has failed to appear or answer after *summons*. The only effect of this is to dispense with the process of *contempt* made a necessary preliminary by the former act of the order for taking the bill *pro confesso*, or for a commission. But no process of contempt can issue but upon a previous default to appear or answer upon summons—it is necessarily founded on a previous summons. Then when the last act comprehends *all* cases, as it expressly does, of *summons*, it necessarily comprehends all cases of *attachment*—the last, by no possibility, being supposed to exist without the other; and then the proceeding to an "interlocutory decree" and commission is not discretionary, but is required of the court, and becomes an imperative duty, upon the application of the complainant. This is made still more clear by the *second* *section* of the act of 1820, *ch.* 161. By that, the terms on which a bill may be taken *pro confesso*, are strictly guarded and limited: Whereas, by the act of 1799, *ch.* 79, the order for taking the bill *pro confesso* is left entirely to the discretion of the court, upon the mere default of the defendant. 3. But if the validity of this argument were fully granted, the pretended right of *election* could avail nothing, since it is perfectly clear that the appellants have pursued neither act, but their proceedings consists of an incongruous medley of both. It is submitted by the appellee, whether the matter of this appeal be at all cognizable by this court. It is an appeal from a merely interlocutory order, which goes no further than to set aside a decree by *default*—leaving the whole merits open to a decision at the final hearing. Nothing is decided between the parties; but every possible claim, that could be asserted by the complainants under their bill, is fully reserved to them; and even *secured* to them by collateral *security.* They can lose nothing but by a failure of *merits* in their claim. This is, moreover, an interlocutory proceeding in a matter wholly under the *discretion* of the Chancellor. It is, therefore, insisted that this appeal be dismissed, as well upon general principles, as upon the authority of the cases in *Jackson vs. The Union Bank of Maryland*, 6 *Harr. and Johns.* 151 (*note.*) *Gover*, *et al. Lessee vs. Cooley*, 1 *Harr. and Gill*, 7. *Snowden vs. Dorsey*, 6 *Harr. and Johns.* 114. The principles upon which the case of *Thompson vs. M'Kim*, 6 *Harr. and Johns.* 302, is to be distinguished, are too recent and familiar to this court, to require any illustration or remark.

Magruder for the appellants, in reply to the last argument of the counsel of the appellee. The real difficulty in this case, is to ascertain to which class of bills, that with which we have to deal, does belong. It cannot be as it has some times been called a cross bill, because that *ex vi terminorum* implies a bill brought by a defendant in a suit against a plaintiff respecting the matter *in question* in that bill; and it is a weapon of defence in such case. *Cooper's Plead.* 85. It cannot be sustained as a bill to impeach a decree for fraud, in obtaining it. Here no fraud is admitted or attempted to be proved, "and the fraud used in obtaining the decree, being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated." *Cooper's Plead.* 97. In reality it attempts to partake of every description of bill, and is a *non descript*. In the argument of the appellee's counsel, it is evidently designed to treat it as a bill of review, or in the nature of a bill of review. These two description of bills agree in all respects, (and also a supplemental bill in the nature of a bill of review, which in some places perhaps this bill is called,) except that the one is the proper bill to be filed *before*, and the other after the decree is enrolled. *Cooper's Plead.* 88, 89. One of the ordinances relative to bills of this description is that "the decree must be first obeyed and performed—if it be for money, the money must be paid," &c. *Cooper's Plead.* 91; "and where a sum of money is ordered to be paid, it is dispensed with, only if it appear that the party was unable to pay it." "And nothing will excuse the party from this duty but evidence of his inability to pay it." *Wiser vs. Blackly*, 2 *Johns. ch. Rep.* 491. "Where the party *is in execution under the decree*, and unable to pay, I should rather conclude that the non payment of the money, is not an insuperable obstacle." Per *Kent*, Chancellor, in *Livingston vs. Hubbs*, 3 *Johns. Ch. Rep.* 128. Such has been the fixed and invariable law, relative to the filing of bills of this description, from the time that bills of review were allowed. It is said there is no "such positive rule of law." As well might it be said, that there is no positive rule of law authorising the Chancellor to allow bills of review to be filed, and therefore they ought not to be allowed. It depends upon the discretion of the Chancellor. *Unde derivatur*, that notion? Is it reasonable? The propriety of calling upon an inferior court to review its own decree, and especially upon the ground of error in law, apparent upon the face of the decree, might well be questioned, unless the performance of it, where money is required to be paid, was insisted upon—the evils arising from its exercise—the delays which it would occasion, would be insufferable. In every case, where a considerable amount of money is directed to be paid, and it was the wish of the defendant, as long as posible to delay the payment of it, instead of taking the appeal which he is by law authorised to take to this court. He could first file his bill of review, and only when that is disposed of, and he was not permitted to file a second, that he would carry his case into the court of last resort, in order to another review. Such bills surely ought not to be encouraged, and the rules which have been adopted to prevent the filing of them merely for delay and vexation ought not to be relaxed. If the plaintiff in a bill of review succeeds in obtaining a reversal of the original decree, a bill may be brought to review the reversal of the former decree, and praying that the original decree may stand. *Cooper's Plead.* 95. If upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal. *Ib.* 92. And a bill of review has been permitted (upon new matter discovered) even after the affirmance of the decree in parliament. *Ib.* 92. There is and ought to be no such "latitude" allowed to the Chancellor "in adapting the terms to the circumstances of each case;" and the cases referred to of *Jackson vs. Union Bank of Maryland*, 6 *Harr. and Johns.* 151 (*note*,) and *Gover*, *et al. Lessee vs. Cooley*, 1 *Harr. and Gill*, 7, are not at all applicable to this.

This case is by no means entitled to be excepted from the operation of the rule. *Scott* knew the situation of the property when he administered. He has been a witness in this case between *Jane Burch* and *Gittings*, and an important witness, as appears by the exhibits. If because the property was in the possession of *Gittings* at the time of his death, he thought it right to include it in the inventory, he ought to have known, that it was not responsible for *Gittings's* debts, and no doubt took care to save himself harmless. It appears, moreover, in the testimony, that when the injunction was served upon him he declared he should hold (as he was authorised by law to hold) a sufficient amount of the proceeds of sale to meet this claim. Some of the money for which negroes sold, he says is uncollected, and if this be true, whose fault is it? The sale was made in October, 1818, on a credit of nine or twelve months. But what excuse can be made for filing this (misnamed) bill of review, when if the plaintiff wished to have justice done him, and the estate settled, an *appeal* to this court would have enabled him to have had the whole matter, not only the law of the case, but whether there was proof to warrant the decree, examined. The decree bears date the 4th of August, 1825, and the bill is filed the 15th of November, 1825—less than four months afterwards. It will be no answer to say that if the money had been paid over, and then the decree reversed, it would have been difficult to get it back. If so the course was to have brought the money into the Court of Chancery, and prays the Chancellor to detain it, pending the appeal, which could have been done, if there were reasonable appprehensions of its being lost. The plaintiff is evidently entitled to no favour. His object is and can only be delay, and to keep the money in his hand as long as it is possible. What is said about the policy of permitting bills of review to be filed after the expiration of the time allowed for appeals, we pass over; for if correct, it does not apply to this case—an appeal might have been prayed.

A few words will dispose of what is said under the *third* objection, as to the manifest errors of *law*. There is nothing in these erros. The decree is warranted either by the act of 1799, *ch.* 79 or 1820, *ch.* 161. The law to which the appellee's counsel refers, (1799, *ch.* 79, *sec.* 6,) authorises a commission for any purpose whatever to issue to *one* person only, or to three persons, with power to any two with the consent of the party or parties in court. There is an end then to the objection to these proceedings under the act of 1799; and there is as little objection to their regularity if it depended altogether on the act of 1820, *ch.* 161. By that act if the defendant fails to appear, upon being summoned, as is the case here, the Chancellor, on application of the complainant, is expressly authorised to issue a commission in order to get the proof necessary to entitle the complainant to relief; and this he did. But he must pass an interlocutory decree. And what is an interlocutory decree in such a case, but that a commission be issued? Is there any *formula* prescribed, and to be strictly observed? Must he at the top, or on the back of that order write "interlocutory decree?" If this order be not a compliance with the law, it is difficult to imagine what is. It need not be said it is *decreed.* The design of the act of 1820, is to put it out of the power of the defendant by refusing to appear or to answer when he ought, to delay the complainant, if the latter be willing to dispense with the admissions which the answer of the defendant might make. The remedy is given only when the defendant is *in default*, and the subsequent clause of the act (1820, *ch.* 161, *sec.* 3,) affords to the defendant every benefit that he could desire. There is nothing in this objection; and need it be said, as little in the objection, the want of the witnesses' signatures to the depositions, nor as to the mode of executing the commissions, (both of which happened to be executed in the very best, and most regular mode,) nor "*above all*, the omission of the *notice* of the time and place of opening and executing the commission." Notice is never to be given *out of court* to a party who will not appear in court. If there had been any irregularity in executing the commission, the defendant ought to (as he might have) appeared in court and filed his exceptions. Objections of this description are not allowed at the hearing. If these objections could be sustained they would be nothing worth on this *bill of review;* they might deprive the complainants of some testimony, without which, perhaps, they could not have obtained a decree below; but it cannot be made a question now, whether if such and such depositions were out of the case, the remainder of the testimony would entitle the complainants to a decree. "A bill of review lies for manifest errors of law, not of *fact.*" *Non constat*, that the Chancellor grounded his decree on any of the exceptionable testimony. He too might have thought that there were some irregularities in execution of one, or the other commission.

What is said *under* the *fourth* objection, and especially in regard to the distinction between a *decree* in a *cause*, and an interlocutory decree, and decrees *nisi*, &c. need not be remarked on. The act of 1820 manifestly forbids any thing like a decree *nisi;* "a decree for relief to be made absolute, or to be vacated on a future contingency."

Nor need it be examined what is designed to prove that the latter act "supersedes and abrogates the former." Much of this, it is presumed, would have been omitted if it had been known that under the act of 1799, as well as of 1820, a commission may be issued to one person. The proceedings were warranted by either of the laws, so that either will be sufficient for the complainants; and it is because this case was in a situation which authorised them to proceed under either law, and the proceedings under both, (except the bill be taken *pro confesso*, under the act of 1799,) are precisely the same, that the learned counsel on the other side, supposes that "their proceeding consists of an incongruous medley of both."

As to what is said by the learned counsel—whether or not this appeal will lie? It need only be answered that it is to be taken for granted that the appeal will lie, until this court reverse (without mentioning others) their decisions in *Munnikuyson vs. Dorsett*, *2 Harr. and Gill*, 374, and *the State*, *use of Sadler's Ex'r vs. Cox*, *Ib.* 379. Surely if from such an *order* by a court of common law an appeal will lie, it will, from an order in Chancery; and surely too every thing which is said now, might have been said, and was said, in the cases here referred to. If this be an interlocutory order, then the order of the court in the cases mentioned was an interlocutory judgment at law, from which, it is well settled, that no appeal will lie. Again, we are now called upon to deal with this as a bill of review, or bill in the nature of a bill of review, filed to ascertain if there be *error of law*, apparent in the body of the original decree. Now whoever heard, in such a case, of such a decree, as the decree under examination? In such a case the only decree which the Chancellor can pass is, that the original bill be dismissed, or else *modified*, and thereby remove the errors of law appearing in the body of the decree. To let in answers—to try the merits of the original suit upon other and new testimony is entirely out of the question, when the bill is a bill of review for errors of *law*, appearing on the face of the decree, and which *ex vi termini* forbids a re-examination of the facts of the decree; even the inquiry whether the original decree is warranted by the testimony already in the case. Such suggestions as are to be found at the close of the argument of the counsel of the appellee, can never belong to a case of this description, and must surely have been made under an impression that this bill of review, though in its commencement for errors of *law*, is in the conclusion a bill "brought *upon discovery of new matter*, that is to come to light after the decree was made." Which certainly it has never been pretended that it was, and even then a new answer is a thing unheard of.

The learned counsel has considered this case throughout as a decree *by default*—an absolute decree grounded (if it had any grounds) upon what he calls an interlocutory decree *nisi*, and he has been misled by what he has read in the *English* chancery books (and perhaps *New-York* also) of the law and practice there prevailing with respect to opening decrees of that description. No such practice exists in our Court of Chancery, and in truth the power of the Court of Chancery here or in *England* to open its decrees because of error or irregularity in obtaining them, is not greater than the power of the courts of law. The power is recognized to exist in our Courts of Equity by the act of 1787, *ch.* 9, *sec.* 6. And this act shows that the court below had the same power to set aside its judgments in the cases before referred to, of *Munnikuyson vs. Dorsett*, and *the State use of Sadlers Ex'r vs. Cox*, that it can be pretended the Court of Chancery had to meddle with its decree in this cause. That there existed stronger grounds for interference in those cases than in this case, cannot possibly be denied. In our Court of Chancery a cause is never disposed of when under rule hearing, because of the default of either party in not appearing to argue it. It is very different in *England*, as will at once be seen by reference to their books of practice;—an example is given in *Cooper's Plead.* 269, (*note*)—a decree made upon the default of the defendant *in not appearing at the hearing*. A decree given for the plaintiff, because of the non appearance of the defendant to open and insist upon his defence, is a thing of constant occurence in the *English* Court of Chancery, (and similar practices prevail in their law courts;) but their being no such practice in our

Court of Chancery, decrees of that description and proceedings in relation to decrees of that description, which so frequently occur in *England*, can be of no service in this State but to furnish *material* for a speech in a desperate case. In *England* the rules of court which authorise such a decree, direct it first to be made *nisi*, and can only be made absolute on the defendant failing to show cause why it should not be, after being served with a writ of *supœna* for the purpose. *Cooper's Plead.* 269, 27. If there be any irregularity in these proceedings; if the decree has been made absolute, when in truth the *subpœna* was not served, a decree founded on the rules of court and subject to those rules, will be open, when it appears to have been taken in violation of those rules. It is the same in the courts of law. There is a rule somewhat like this in this court, and the construction given to that rule ought to have been conclusive with the Chancellor, and should have influenced him to dismiss this bill, and *to have revoked his order which suspended all proceedings under the original decree.* The rule alluded to, is that which entitles the appellee to an affirmance of his judgment *nisi*, if the appellant and his counsel are absent when the court reaches the case, and to an *absolute* affirmance if within a certain number of days thereafter, notes are not filed on the side of the appellant. Now suppose this case had been in this court, and had been affirmed under that rule, would all the reasons and excuses suggested in this bill have induced the court to *open* the affirmance, *at a succeeding term?* If one term or more after a judgment is affirmed under this rule, the appellant was to apply for an order to open the decree, in order to try the merits, and because the appellee can "lose nothing but by a failure of merits in his claim;" and he was by affidavit to make known to the court that he had employed a counsellor, and if you please, one who was not a regular practitioner of the court, and could not neglect other courts and other business to attend a court in which he did not regularly practice, once had really thought his counsellor did go to court, and would be there when the cause was regularly called up and never knew to the contrary, till the appeal was affirmed. It is apprehended, that precisely that same answer which this court would give to such an application, is the one which the Chancellor ought to have given to *Scott;* and for not giving it, there is error in his decreee, and in his suspending proceedings under the former decree, which it is the duty of this court to correct. *Scott's* case is infinitely worse. He apologizes for not having filed an answer—it was lost. But he makes no sort of apology for that of which we complain, and which caused so much delay in the court below,—his contempt in *not appearing* to the suit, or giving any attention to the case from September term, 1823, when he was bound to appear, until November, 1825, when for the first time he came into court, to stay the proceedings.

STEPHEN, J. delivered the opinion of the Court.

Considerable difficulty has been felt in coming to a decision in this case, which involves principles of practice not of very frequent occurrence, and which affect in a high degree, the regular and ordinary administration of equitable jurisprudence. It appears by the proceedings in the court below, and which have been brought up here on appeal, that a controversy exists as to the right of property in certain negroes, or the proceeds for which they have been sold, between the representatives of *Jesse Burch*, and those of a certain *Kinsey Gittings.* To recover these proceeds and to have a distribution made among them, the representatives of *Burch* filed their bill of complaint in the Court of Chancery, on the 14th day of July, 1823, against *William Scott*, one of the appellees, as the administrator of said *Gittings*, in which bill they also pray for an injunction, to prevent *Scott* from paying over, or in any manner parting with the proceeds of sale until the final decree of the court.

The Judge here referred to the proceedings in the Court of Chancery before set forth, including the decree of the Chancellor, and then continued.

Upon the propriety of this discision this court are now called upon to decide. As a bill of review to reverse the decree of the Chancellor, for error apparent on the face of the decree, it cannot be available for the complainants. The error which will reverse a decree upon such a bill must appear in the body of the decree itself. *Wyatt* in his Practical Register, page 94, states that a bill of review is to examine and reverse a former decree upon error of law appearing in the body of the decree itself, without averment or further examination of any matter of fact before the decree, or of any matter resting upon record, which might have been had at the time of the decree—so in page 98 of the same book, he states the principle to be that upon a bill of review, the party cannot assign for error, that any of the matters decreed, are contrary to the proofs in the cause; but must shew some error appearing in the body of the decree, or new matter discovered since the decree made. So in *Catterall vs. Purchase*, 1 *Atkyn's Rep.* 290, the Lord Chancellor observed it is true on arguing a demurrer to a bill of review nothing can be read but what appears on the face of the decree, but after the demurrer is over ruled, the plaintiffs are at liberty to read bill or answer, or any other evidence, as at a rehearing, the cause being now equally open. To the same effect see *Cooper's Pleadings in Equity*, page 89, *Mitford*, page 178. *Taylor vs. Sharp*, 3 *Peere Williams*, 371—If a decree be obtained and enrolled, so that the cause cannot be reheard upon a petition, there is no remedy but by bill of review, which must be upon error appearing upon the face of the decree, or upon some new matter, as a release, or a receipt discovered since—*Wyatt. P. R.* page 98. When a bill of review is brought for error apparent, according to the English practice, the usual method is for the defendant, to put in a plea, and demurrer; a plea of the decree, and a demurrer against opening the enrollment; so that in effect a bill of review cannot be brought without having the leave of the court in some shape; for if it be for matter appearing in the body of the decree, then upon the plea and demurrer of the defendant to the bill the court judges whether there are any grounds for opening the enrollment; if it be for matter come to the plaintiffs knowledge after pronouncing the decree, then upon a petition for leave to bring a bill of review, the court will judge if there be any foundation for such leave, *Wyatts P. R.* page 99. The defendant generally puts in the usual demurrer, that there is no error in the decree. He rarely or ever answers unless ordered thereto by the court, and the demurrer being set down to be argued, the court proceeds to affirm or reverse the decree, and the prevailing party takes the deposite, (*a*) same book, same page. In the case now before this court, the defendants have thought fit to desert the usual course of proceedings, according to the above practice, and have put in their answer instead of demurring. But upon a bill of review for error apparent no distinction has been discovered, between an answer, and a demurrer, because in both cases the court will judge whether there be error in the body of the decree. Upon examining the decree in this case, it does not appear to this court, that there is any error in law apparent upon its face, nor can the bill be supported upon the ground of new matter discovered since the decree, because such new matter must be to prove what was before in issue, and the leave of the court must be obtained before a bill of review can be filed on this ground, and which the court will not grant, without an affidavit that the new matter could not be produced or used by the party claiming the benefit of it at the time, when the decree was made. No such new proof is alleged in this case to have been discovered since the decree was made. *Cooper's Plead. in Equity, page* 91. A supplemental bill in the nature of a bill of review, for want of proper parties will not be available, after a decree has been signed and enrolled. *See Wiser vs. Blachly*, 2 *Johnson N. Y. C. Rep.* 488. *Cooper's Equity Plead. page* 94, where a decree is impeached on the ground of fraud practised in obtaining it, the fraud must be established by proof, before the propriety of the decree can be investigated, same book, page 97. There is nothing in this case by which it can be sustained upon the ground of new matter discovered since the decree, for such new matter as already remarked, must be something tending to prove what was in issue between the parties. *Cooper's Equity Plead. page* 91, and where either a bill of review

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(*a*) A sum formerly deposited in court as a security, to satisfy costs and damages for delay, if the matter should be found against the party who preferred *such bill. Wyatt's P. R.* 51, *ed. of* 1714.

after enrollment, or a supplemental bill in the nature of a bill of review before enrollment are brought upon the ground of such discoveries, the leave of the court must be obtained, which the court will not grant without affidavit that the new matter could not be produced or used by the party claiming the benefit of it, at the time when the decree was made. *Cooper's E. P. pages* 91, 92, 93, 94. *Wyatt's Chancery*, 98, 99. As to the question, when a decree of the Court of Chancery of this State is to be considered and taken as enrolled, we consider it to be clothed with that solemnity, when it is signed by the Chancellor, and filed by the register, and the term has elapsed during which it was made. The only question which remains to be considered is, whether it is consistent with the salutary and wholesome exercise of that sound discretion, which it is admitted the court possesses upon subjects of this nature, to open or discharge the enrollment and vacate the decree, in this case for the purpose of enabling the defendant to make his defence. Upon full and mature deliberation, we are of opinion that it is not. We consider that the establishment of such a lax principle of practice would be productive of the most deleterious consequences, in the administration of equitable jurisprudence, by the tribunals clothed with Chancery powers in this State. After being repeatedly in contempt by disregarding the solemn process of the court, the complainant makes his present application rather with an ill grace. *In Wooster vs. Woodhull*, 1 *Johnson N. Y. C. R. page* 541, the Chancellor says, "the interference of the court to relieve a party from the consequences of his default must depend upon sound discretion, arising out of the circumstances of the case. There is no general and positive rule on the subject; and Lord Thurlow observed in one case, (*Williams vs. Thompson*, 2*d Bro.* 279,) that if a defendant comes in after a bill has been taken *pro confesso*, upon any reasonable ground of indulgence and pays cost, this court will attend to his application, if the delay has not been extravagantly long. If the indulgence be great and frequent, there is danger of abuse of the precedent, for the purposes of delay. According to the opinion of Lord Hardwicke as stated in this case, the question in such cases is, on which side the greatest inconvenience would lie? Testing the propriety of granting the present application by that principle, and but little doubt can exist as to the fate which ought to await it. On the one hand if granted, the complainant might gain an advantage which he has lost by his own repeated contumacy and gross negligence; on the other hand instead of a regular and speedy administration of justice by a prompt and respectful attention to the process and jurisdiction of the court, they will be disregarded and disobeyed, whenever a respondent could thereby gain an advantage, to the great reproach of the law, and the most serious delay in the judicial dispensations of justice. On these grounds it is conceived, that the Chancellor erred.

DECREE REVERSED.

ALDRIDGE & HIGDON *vs.* TURNER—*December*, 1829.

The endorsement of T, on the promisory note of E payable to A, as follows: "I hereby guarantee the ultimate payment of the within note," is void for want of consideration; and under the plea of *non assumpsit* to a declaration founded upon that guaranty, the objection to the want of consideration may be taken.

APPEAL from *Saint Mary's* County Court. This was an action of assumpsit, brought on the 19th of February, 1825. There was but one count in the declaration, which stated "That whereas one *Charles C. Egerton, jun.* before the making of the promise and undertaking herein after mentioned, to wit, on the 21st day of April, in the year 1820, at the town of *Baltimore*, in *Baltimore* county in the State of *Maryland*, to wit, at the county aforesaid, made and signed his certain note in writing, commonly called a promissory note, bearing date the day and year aforesaid; and thereby six months after date of the said note, promised to pay to the said *Andrew Aldridge* and *Benjamin D. Higdon*, by the name of *Aldridge* and *Higdon*, or order, for $695 40 for value received, by him the said *Charles C. Egerton, jun.* and then and there delivered the said note to the said

Benjamin D. and *Andrew*, whereby, and by reason of which said promise, and by force of the statute in such case made and provided, the said *Charles C. Egerton, jun.* became liable to pay to the said *Andrew* and *Benjamin D.*, the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and thereupon afterwards, to wit, at the county aforesaid, in consideration of the premises and to secure the payment of the said sum of money, in the said note mentioned, to the said *Andrew* and *Benjamin D.*, he, the "said *Josiah Turner*, upon himself assumed, and to the said *Andrew* and *Benjamin D.*, then and there promised to guarantee the payment of the sum of money mentioned in the note herein before stated; by signing with his own proper hand writing on the back of the said note, the following obligation: 'I hereby guarantee the *ultimate* payment of the within note. *Josiah Turner.*' And the said *Andrew* and *Benjamin D.* aver, that the said *Charles C. Egerton, jun.* hath not paid to them the said sum of money, in the said note mentioned, or any part thereof, at any time whatever, but therein hath wholly failed and made default, and is not able to pay; of all which said premises, the said *Josiah Turner* afterwards had notice at the county aforesaid, and by reason whereof, and according to the said guarantee and undertaking of the said *Josiah*, in form aforesaid made, he, the said *Josiah*, became liable to pay to them, the said *Andrew* and *Benjamin D.*, the said sum of money, in the said note mentioned, when he should be thereunto requested, and being so liable, he, the said *Josiah*, in consideration thereof," &c.

The defendant pleaded *non assumpsit* and *non assumpsit infra tres annos.* General replication to the last plea, and issues joined.

At the trial of this cause, the plaintiff gave in evidence to the jury, the note of *Charles C. Egerton, jun.* to the plaintiffs', and the defendants' assumption thereon, as follows. "*Baltimore, April 21st*, 1820. $685 40. Six months after date, I promise to pay to *Aldridge & Higdon*, or order, six hundred and eighty-five dollars and forty cents, for value received.—*Charles C. Egerton, jun.*" On the back of the aforegoing note were the following endorsements, to wit: "I hereby guarantee the ultimate payment of the within note. *Josiah Turner.*" "1821, *November* 7. Received *J. Turner & Co's* note, at sixty days, for $106 50." And proved the signatures of said *Egerton* and *Josiah Turner* thereon; they also gave in evidence, the judgment of *Aldridge* and *Higdon* against *Charles C. Egerton, jun.*, obtained in March, 1824, on this note, and the proceedings thereon, two writs of *fieri facias*, returned *nulla bona.*

The plaintiffs also read in evidence, a conveyance from *Charles C. Egerton, jun.* to *Josiah Turner* and *Edward Maddox*, dated the 6th of February, 1824, reciting that the said *Egerton* was indebted to *Josiah* and *Philip Turner*, on two notes dated, &c., and that they had become security for said *Egerton*, in certain enumerated notes, "and in divers other cases, not at this time to be accurately enumerated and set forth; also, that the said *Maddox* had become security for the said *Egerton* &c., whereby, in consideration of the premises, and of the sum of five dollars," the said *Egerton* conveyed to the said *Turner* and *Maddox*, sundry negro slaves, goods and chattels, &c. in trust for the said *Turner* and *Maddox*, to sell and dispose of the said negroes, goods and chattels, &c. and apply the proceeds to the discharge of the debts due as before mentioned, and to indemnify them against suretyships, &c. the said conveyance was duly acknowledged and recorded according to law. Whereupon, the defendant prayed the court to instruct the jury, that the plaintiffs were not entitled to recover; because no liability attached to the defendant in this cause, by the assumption endorsed on the aforesaid note, there being no consideration mentioned in said assumption; which instruction the court gave. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before **Buchanan**, Ch. J., **Earle** and **Dorsey** J.

Stonestreet for the appellants, contended that the defect in the plaintiffs cause of action should have been taken advantage of by demurrer.

A. C. Magruder, for the appellee.

Buchanan, Ch. J. delivered the opinion of the Court.

We do not perceive any error in the opinion of the court below, and the instruction given at the trial to the jury, that the plaintiffs were not entitled to recover.

The guaranty by *Turner*, written upon the back of the promissory note, given by *Egerton* to the plaintiffs, of the ultimate payment of the amount, appearing to be wholly without consideration, was clearly *nudum pactum* and void; and the plea of *non assumpsit* which was filed by the defendant to the declaration founded upon that guaranty, properly let in the objection of the want of consideration.

JUDGMENT AFFIRMED.

TURNER, Adm'r of WILDER, *vs.* ANN EGERTON.
December, 1829.

The value of property delivered by an administrator to a distributee, as payment of his portion of a deceased's estate, cannot be recovered back in a court of law, in consequence of such administrator being afterwards compelled by a recovery at law, to pay a debt due by the deceased, of which he was not aware when he distributed the estate; or his having in part paid the debts of the deceased, out of his own private funds. The remedy for such claims is in a court of equity.

It is not universally true, that where one is benefitted by the payment of money by another, the law raises an *assumpsit* against the party benefitted, in favour of the party paying the money. A stranger cannot at his pleasure make me his debtor, whether I will or not, by paying a debt due from me to another.

Where one is compelled to pay the debt of another, he may recover against him in an action for money paid, upon the promise which the law implies, as in the case of money paid by a surety in a bond, which is considered as paid to the use of the principal, and may be recovered in an action against him for money paid.

Appeal from *Saint Mary's* County Court. This was an action of *assumpsit*, brought by the appellant, the plaintiff below, against the appellee. The declaration contained five counts, one for matters properly chargeable in account,—for money laid out and expended,—for money lent and advanced, —for money had and received,—and on an *insimul computassent.* The defendant pleaded *non assumpsit* and issue was joined.

At the trial, the plaintiff offered in evidence to the jury, and proved by competent testimony, that *Edward Wilder*, as administrator of *James Egerton*, paid over to *Ann Egerton*, the defendant, property (belonging to the estate of his intestate *James Egerton*, and with which he had charged himself in the inventory of the deceased estate) amounting by the appraisement, to the sum of $791 47, in February of the year 1812, and that he had paid over a like amount of property to the other distributees. He also proved that the said *James Egerton* left at his death, six children, his only heirs and distributees of his personal estate, all of whom are now living, and that *Ann Egerton*, the defendant, is one of them: he also gave in evidence to the jury, the inventory and six accounts, exhibited and passed in the Orphans' Court of said county, by *Edward Wilder* as administrator aforesaid. The inventory referred to, was returned and proved on the 12th of June, 1811, amounting to $9348 96. The first account passed by said *Edward Wilder* on the 2d of June, 1812, charged him with the amount of the inventory and cash received from sundry persons, the whole amounting to $11,385 66, credited him with payments and disbursements amounting to $104 64, leaving a balance due of $10,342 01,—the second account left a balance due of $10,154 70,—the third account left a balance due of $7,285 89,—the fourth account left a balance due of $500 36, —the fifth account left a balance due of $2,095 18,—and the sixth account left a balance due of $1,503 80. He also proved that a large debt was recovered by judgment of *Saint Mary's* County Court, against the said *Edward Wilder*, as administrator of *James Egerton*, which he did not expect would be recovered at the time he made a distribution of the assets among the distributees as aforesaid, and which judgment was paid by him; he also proved that the debts were in part paid by *Wilder* from his private funds, for the reinbursement of which, this action is brought; upon this proof, the defendant then prayed the court to instruct the jury, that under the pleadings and evidence in this cause, the plaintiff was not entitled to recover, which instruction the court gave. The plaintiff excepted, and the verdict and judgment being for the defendant, the plaintiff appealed to this court.

The cause was argued before **Buchanan**, Ch. J., **Earle** and **Dorsey**, J.

Stonestreet for the appellant contended.

1. That the court below erred in giving an instruction against the plaintiff, upon the general prayer, that upon the pleadings and evidence, he was not entitled to recover. The particular objection should have been stated. *Act of* 1825, *ch.* 117.

2. The plaintiff having proved an over payment might recover it back in this form of action.

C. Dorsey, for the appellee. Insisted that an action at law cannot be sustained against a legatee or distributee, for money overpaid him by an executor or administrator. 2 *Fonbl.* 376. (*Ed.* 1820.)

Buchanan, Ch. J. delivered the opinion of the Court.

This is the case of an administrator who thinking he has paid off all the debts of the deceased, delivered over to the children of the deceased, the proportions of the residue of the personal estate, to which they were respectively supposed to be entitled as distributees. But being afterwards compelled by a recovery at law, to pay a considerable debt due by the deceased, of which he was not at the time aware, and having in part paid the debts of the deceased, out of his own private funds, brought his suit against one of the distributees to recover a just proportion of the amount so recovered against, and paid by him. The *counts* in the declaration for matters proper chargeable in account, money lent and advanced, money had and received, and on an *insimul computassent*, are entirely out of the question, there being no evidence in the cause in any manner or sense applicable to either of them; and the question is, whether, under the circumstances disclosed, the plaintiff is entitled to recover on the count for money laid out and expended.

It has been urged, that where one is benefited by the payment of money by another, the law raises an *assumpsit* against the party benefited, in favour of the party paying the money, but the universality of that proposition is not admitted. A stranger cannot at his pleasure make me his debtor, whether I will or not, by paying a debt due from me to another. Such a payment might ordinarily be deemed to be for my benefit, yet the law does not in such a case raise an *assumpsit*. If it were so, it would be to put every man who owed a debt at the mercy of an enemy, who might choose to make himself his creditor without his concent or authority, for the purpose of harrassing and distressing him: and to deprive him of defences which he might have had to a suit by his original creditor, but of which he would not be able to avail himself, against such newly created liability. It is true that where one is compelled to pay the debt of another, he may recover against him in an action for money paid, &c. upon the promise which the law implies, as in the case of money paid by a surety in a bond, which is considered as paid to the use of the principal, and may be recovered in an action against him for money paid, &c. But that is not this case. Here was no debt due from the distributee to the creditor of the intestate, no demand which could have been enforced at law against her; and the money paid by the plaintiff, though not voluntarily, but under a recovery against him in a suit at law, was in discharge of his own liability as administrator, and not of a debt due from the distributee, nor on account of his being placed in a situation of responsibility by any act of hers. It was not therefore a payment of money to her use, for which the law will raise an implied promise of repayment, on account of there being in her hands a portion of the personal assets of the intestate. If in such a case as this, an action at law could be maintained on the ground of an implied *assumpsit*, it would be in the power of fraudulent or negligent executors and administrators, by covinously or carelessly suffering judgments to go against them, and constituting themselves creditors of legatees, and distributees without their knowledge or authority, so to change their predicament against their consent, as in suits at law instituted upon such implied promises, to deprive them of the benefit of defences, that might be accorded to them in proceedings in Chancery against the funds in their hands, by the original creditors of the deceased, which would be of mischievous consequence to legatees and distributees. And it would be unjust to permit an executor or administrator, by thus constituting a legatee or distributee his debtor, without his consent or knowledge, to place him in a worse situation in relation to that debt than he stood in before; which would be the case if he could pursue him for the recovery of it, on an implied *assumpsit*, in a court of law instead of a court of equity, where alone he could have been called upon before, where equity is administered, in a manner, in which it cannot be in a court of law. A court of law not being a fit tribunal to investigate and unravel accounts of executors and administrators, and not being so constituted as to be able, to take into consideration, in the manner that a court of equity would, how the funds were in fact appropriated, and the mode in which they might, and ought to have been applied. With this view of the subject, we think with the court below, that the plaintiff is not entitled to recover, and that in bringing his action in a court of law he mistook his tribunal, and ought to have sought his remedy in a court of equity, where matters of the kind are properly cognizable, and the interests of all parties equally protected.

JUDGMENT AFFIRMED.

TURNER, Adm'r of WILDER *vs.* EGERTON.—*December*, 1829.

An action at law cannot be maintained to recover back a payment in money, made by an administrator to the guardian of a distributee of his intestate. The remedy is in Equity.

APPEAL from *Saint Mary's* County Court. This was an action of *assumpsit*, brought by the appellant against the appellee, who was guardian of *E. Egerton*. The declaration contained a count, for matters and articles properly chargeable in account, the money counts, and a count on an *insimul computassent*. Plea *non assumpsit* and issue.

The facts of this were similar to those of the preceding case, with the addition here that the guardian, the defendant, had received a payment in money from *Wilder*, as administrator of *James Egerton*, on account of his ward, who was a distributee of *James Egerton*.

The defendant prayed the court to instruct the jury, that the plaintiff was not entitled to recover for the following reasons: first, that the plaintiff had proved that the payment to the guardian was in specific property, negroes, &c.; as in the receipt specified, and therefore he could not support this action upon the pleadings against the defendant for the recovery of the money, which instruction the court gave, the plaintiff excepted. And the verdict and judgment being against him, he appealed to the Court of Appeals.

The case was argued before **Buchanan**, Ch. J., **Earle** and **Dorsey**, J.

Stonestreet for the appellant.

C. Dorsey for the appellee.

Buchanan, Ch. J., delivered the opinion of the Court.

This case does not materially differ from that just decided, between the same plaintiff and *Ann Egerton*, and must be governed by the same principles. There the supposed proportion of the personal *assets* of the deceased was delivered over to the distributee in specific property, and in this case the administrator settled up with the guardian of one of the children of his intestate, for the proportion to which the ward was supposed to be entitled as a distributee, and the two suits were brought to recover back proportionate parts of the same debt due by the intestate, which the administrator was compelled to pay, by a recovery against him at law, after he had made distribution of the assets.

The evidence of the settlement with the guardian is a receipt, by which it appears that he received a part of his wards supposed proportion of the estate in money, and the residue in specific property. And there being in the declaration in this case, a *count* for money had and received, it was urged in argument, that under that count, the plaintiff would be entitled to recover on account of the money paid to the guardian, which it was supposed distinguished it from the other case, where no money was paid to the distributee, but specific property only delivered over.

But there is no foundation for such a distinction. If where an executor or administrator has delivered over specific articles of property to a distributee, and is afterwards made to pay debts due by the deceased, the law will not raise an *assumpsit*, on which an action can be maintained against the distributee for money *paid;* there is no reason, why an action at law for money *had and received*, should be sustained, where money has been paid to a distributee in lieu of the specific articles of property.

The inconvenience and mischief to distributees would be the same in both cases, and the reasons why a court of law should not entertain an action, but the party be put to seek his remedy in Chancery, apply as well to one case as the other. *In Johnson vs. Johnson*, 3 *Bos. and Pull.* 169, it is treated as settled, that if an executor thinking he has paid off the debts of his testator, pays the legacies, he cannot maintain an action in a court of common law, for money had and received against a legatee, but must seek his remedy in equity. The same principle applies to the case of a distributee; and the circumstance that in this case the money was paid to the guardian of the distributee, and not to the distributee himself, can make no difference.

JUDGMENT AFFIRMED.

HALKERSTONE'S Executor, vs. HAWKINS.—*December*, 1829.

In an action upon a bond, with condition that the obligor, the defendant, should exhibit all the papers concerning and touching the estate of the late W, deceased, to B, mutually appointed by the obligor and obligee to settle said estate, issue was joined upon a replication, which assigned as a breach, the failure to exhibit such papers. HELD, that it was competent for the plaintiff to offer in evidence, an inventory of W's personal estate, returned by the defendant as his administrator to the Orphan's Court, it being a paper concerning the estate of W, necessary to its settlement, one which by the condition of the defendant's bond, should have been exhibited to B, and proper to enable the jury to ascertain the amount of damages to be awarded to the plaintiff.

APPEAL from *Charles County* Court. This was an action of debt, brought by the appellant as executrix of *Robert Halkerstone* against the appellee, on a bond to the said *Robert*, in the penalty of £200, dated on the 10th of June, 1812, with the following condition: "The condition of the above obligation is such, that if the above bound *Samuel Hawkins*, his heirs, executors, administrators or assigns, shall exhibit all the papers concerning and touching the estate of the late *William Halkerstone*, deceased, to *Humphrey Barnes, Esq.* who is mutually appointed by the above parties to settle said estate, and strike a balance, if any, and also pay or cause to be paid, such balance, if any, to the above *Robert Halkerstone*, his heirs or assigns, that then the above obligation to be void, else to be and remain in full force and virtue in law." Signed, "*Sammuel Hawkins, Seal.*" The defendant pleaded *non est factum*, and general performance. Issue joined to the first plea, and replication, denying the exhibition of the papers mentioned in the condition of the bond to the second plea. Rejoinder performance, and issue joined.

At the trial, the plaintiff offered in evidence to the jury, the inventory of the personal estate of *William Halkerstone*, deceased, returned and recorded in the Orphan's Court of *Charles County*, by *Samuel Hawkins*, the administrator, to the admissibility of which testimony the defendant objected, and the court sustained the same objection, and refused to let the said inventory be read to the jury; the plaintiff excepted. The court then instructed the jury, that the plaintiff having failed to give testimony to prove the amount of the damages, the jury would give a verdict for nominal damages; the plaintiff excepted, and the verdict and judgment being but for nominal damages, the plaintiff appealed to the Court of Appeals.

The cause was argued before **Buchanan**, Ch. J., **Earle** and **Dorsey**, J.

Stonestreet for the appellant.

C. Dorsey for the appellee, cited *Gaines vs. Griffith*, 1 *Saund.* 58. (*note.*)

Buchanan, Ch. J. delivered the opinion of the court.

The condition of the bond on which this suit was instituted is, that *Hawkins*, the defendant, his executors, &c. "shall exhibit all the papers concerning and touching the estate of the late *William Halkerstone*, deceased, to *Humphrey Barnes*, *Esq.* who is mutually appointed by the above parties, to settle said estate, and strike a balance, if any, and shall also pay or cause to be payed such balance, if any, to the above *Robert Halkerstone*, his heirs or assigns," &c.

The plea is a plea of general performance. The replication assigns as a breach of the condition of the bond, that *Hawkins*, the defendant, did not exhibit all the papers concerning and touching the estate of *William Halkerstone*, deceased, to *Humphrey Barnes*, at any time previous to the impetration of the writ, although often requested, &c. pursuing the terms of the condition, to which there is a rejoinder by the defendant, that he did exhibit all the papers concerning and touching the estate of *William Halkerstone*, deceased, to *Humphrey Barnes*, previous to the impetration of the writ, &c. and issue.

In this state of the pleadings, the parties went to trial, when the plaintiff offered in evidence to the jury, the inventory of the personal estate of *William Halkerstone*, deceased, which had been returned by the defendant, the administrator, and was recorded in the Orphan's Court of *Charles* County, amounting to five hundred and thirty-four pounds nineteen shillings and sixpence, which was objected to by the counsel for the defendant and rejected by the court as inadmissible.

It does not appear why this paper was not permitted to go to the jury, it was made out and returned by the defendant himself to the proper office, it is a paper concerning and touching the estate of *William Halkerstone*, deceased, necessary to the settlement of that estate, and one which by the condition of the defendant's bond, should have been exhibited to *Humphrey Barnes*.

The issue joined by the parties in the pleadings presented to the jury the question, whether the defendant had exhibited to *Humphrey Barnes* all the papers concerning and touching the estate of *William Halkerstone*, deceased; the affirmative of which issue being held by the defendant, the burden of proof was imposed upon him; and in the absence of proof to sustain the issue on his part, it became necessary for the plaintiff, who sesuit was brought for the recovery of damages sustained by reason of the breach assigned in the replication of the condition of the bond, to offer such evidence to the jury as would enable them to ascertain the amount of damages that he was entitled to recover.

And as the amount of the personal estate of *William Halkerstone*, deceased, which had not been settled up, (to procure the settlement of which was the object of the bond,) was necessary to be shown in order to arrive at the damages proper to be recovered, the inventory regularly returned by the defendant himself, the administrator, would seem to have been not only an important, but an essential link in the chain of evidence necessary to the ascertainment of that amount.

It did not lay in the mouth of the defendant who as administrator, had himself prepared and returned it under the requisite sanctions to the proper office, to object to the admissibility of it, and perceiving no reason why it should have been rejected. We think the court below erred in not suffering it to go to the jury, and that having thus thrown out important testimony offered by the plaintiff, for the purpose of showing the damages sustained, and which was pertinent to the issue joined in the cause; that court also erred in instructing the jury, "that the plaintiff having failed to give testimony to prove the amount of damage, they could only give a verdict for nominal damages."

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

DYER *vs.* DORSEY and EDELEN.—*December*, 1829.

In an action upon agreement, by which, after reciting that D had sold to W tracts or parcels of land, sold by A to C and R, and by their agents sold to D, and for which D had executed a deed to W; D covenanted with W, that a deed should be executed to him, conveying to him the said lands of C and R, by a given day, and to that, bound himself in a certain penalty;—such penalty cannot be recovered as liquidated damages, it was only intended by the parties as a security for the faithful performance of the contract.

In this case, the sum of money which it might be necessary to pay, for obtaining the title of C and R, would furnish the true measure of damages, for a breach of D's covenant, the proof of which sum was on the plaintiff; and it appearing that the plaintiff had not paid D the whole of the purchase money for the said lands, the jury were properly instructed that in estimating the amount of damages, they should, under the act of 1785, *ch.* 46, *sec.* 7; deduct whatever sum of money remained in the hands of the plaintiff on account of said purchase.

APPEAL from *Charles County* Court. This was an action of *covenant*, brought on the 2d of February, 1824, by the appellant, (the plaintiff in the County Court) against the appellees, the defendants in that court, on the following agreement, to wit: *C. Dorsey* having sold to *William C. Dyer*, tracts or parcels of land, sold by *Henry Anderson* to *Campbell* and *Ritchie*, and by their agent, *Henry H. Chapman*, sold to *C. Dorsey*, and for which lands the said *Dorsey* has executed a deed to the said *William C. Dyer*. Now we hereby covenant and bind ourselves to the said *Dyer*, that a deed shall be executed to the said *Dyer*, conveying to him the said lands during the month of August, of *Campbell* and *Ritchie*, and to this we bind ourselves in the penalty of two thousand dollars. Witness our hands and seals this eleventh of June, 1822.

The breach laid in the declaration was, that the defendants had not executed, or caused to be executed to the plaintiff, a conveyance of the title of *Campbell* and *Ritchie*, at the time mentioned for that purpose in the said agreement, before or since; but that they had wholly neglected, and refused so to do. The defendants pleaded *non infregit conventionem.* Issue joined.

At the trial the plaintiff read in evidence, the covenant on which this action was brought, which the defendants admitted was signed and sealed by them. He then read in evidence the following agreement: "Memorandum of an agreement, entered into on this 26th day of April, 1822, between *Clement Dorsey*, of *Saint Mary's* county, and *William C. Dyer* of the other part; the said *Dorsey* covenants and agrees to sell to the said *Dyer* the land which he bought of *Henry H. Chapman*, and which was conveyed to him by *Henry Anderson*, and to give him possession thereof at Christmas next, for which the said *Dyer* covenants to pay him twenty-five hundred dollars; if the said *Dorsey* request it, the said *Dyer* is to pay him one thousand dollars when called on, and the residue at Christmas next; the said *Dorsey* stipulates to give the said *Dyer* a good and legal title to the same in fee simple, with a general warranty; the said *Dorsey* has the use of the same this year, but is not to cut wood or timber therefrom, and is to permit the said *Dyer* to seed thereon; the said sum of one thousand dollars is not to be paid till the deed is executed to the said *Dyer*. In witness whereof," &c. He then gave in evidence to the jury, that he had paid *C. Dorsey*, one of the defendants, the sum of fifteen hundred dollars. The defendants then proved, that the plaintiff had held possession of the land in question, since the original purchase up to this time, and gave evidence that the plaintiff admitted that he owed the defendant *Dorsey*, upwards of one thousand dollars, for the land purchased of the said *Dorsey*, of which the plaintiff has had uninterrupted possession to this time. The plaintiff then prayed the court to instruct the jury, that from the pleadings and the evidence in this cause, the plaintiff was entitled to recover the penalty of two thousand dollars, in the said agreement mentioned, upon which the action is brought, which opinion and direction the court refused to give, but were of opinion, and so instructed the jury, that the sum of money which it might be necessary to pay for the obtaining of the title of *Campbell* and *Ritchie*, would furnish the true measure of damages in this case, and that the proof of that fact was upon the plaintiff. They further instructed the jury that in estimating the amount of damages in this case, they should deduct whatever sum of money remained in the hands of the plaintiff, on account of the purchase made by him of *Clement Dorsey* the defendant; the plaintiff excepted, and the verdict and judgment being but for nominal damages, he appealed to this court.

The cause was argued before **Buchanan**, Ch. J., **Earle**, **Archer** and **Dorsey**, J.

Stonestreet for the appellant, referred to *Cannell vs. M'Lean*, 6 *Harr. & Johns.* 297.

C. Dorsey, for the appellees, referred to the act of 1785, *ch.* 80, *sec.* 13. He contended that the case in 6 *Harr. & Johns.* was not applicable, as the party there was not in possession of the land.

Archer, J. delivered the opinion of the court.

The penalty cannot be recovered in this case as liquidated damages. It was only intended by the parties as a security for the faithful performance of the contract.

The value of the land at the time of the breach of the contract ought not, as has been contended, to constitute the measure of damages, for such a rule applied here, would work this injustice. The plaintiff would obtain the value of the land, and would moreover hold *Dorsey's* right and title, having obtained a conveyance for the same, and would be left in possession of the land. Some outstanding right to these lands existed in *Campbell* and *Ritchie*, but its precise nature and character does not distinctly appear. *Anderson* was their original proprietor, who sold them to *Campbell* and *Ritchie*, and *Chapman* the agent of *Campbell* and *Ritchie*, sold them to *Dorsey*. The right, whatever it was, which *Dorsey* acquired under these contracts, *was conveyed by deed to the plaintiff.* These facts shew how essentially this case varies from the case of *Cannell vs. M'Lean*, 6 *Harr. & Johns.* 297. The rule laid down by the court below, as to the measure of damages, is the correct rule to be applied to this controversy. It completely secures the plaintiff, and indemnifies him against the defendant's breach of the contract. We also concur with the court below in the opinion by them expressed, that the *onus* of proof in this respect, lies upon the plaintiff; for the plaintiff must always be prepared with proof to shew the extent of injury he may have sustained, by the breach of any contract, before he can be entitled to recover his measure of damages.

We perceive no error in the direction which the court gave to the jury, that they ought to deduct from the damages they should find, whatever sum of money remained in the hands of the plaintiff, on account of the purchase made by him of *Dorsey.* The doctrine held out by this opinion, is maintained and settled by the Court of Appeals, in the case of *the Baltimore Insurance Company vs. McFadon*, 4 *Harr. & Johns.* 31, in which the court have given a construction to the act of 1785, *ch.* 46, *sec.* 7, in relation to set off.

JUDGMENT AFFIRMED.

CLARKE *vs.* BELMEAR.—*December*, 1829.

A return by the Sheriff to a writ of *fieri facias*, that he had levied upon "part of a tract of land called B, supposed to contain, &c." is not sufficient, would be quashed on motion, and unavailable in ejectment to prove title in a purchaser.

A purchaser at a sheriff's sale is entitled to the benefit of that officer's return, both to the *fieri facias*, and *venditioni exponas;* and when the description of the subject levied on, according to the schedule returned under the first writ, is defective, it may be amended and rendered certain, by the return of the sheriff's proceedings, under the second writ.

So a levy under a *fieri facias* which is defective in the description of the property levied on, may be amended by the sheriff's return of the property sold under such writ, the return of the sale describing the property with sufficient certainty.

A purchaser under a judicial sale has a right to resort to the whole judicial proceedings, under which his title accrued, to ascertain it.

The right of a party to obtain a writ of *habere facias possessionem*, under the act of 1825, *ch.* 103, does not relate to the time the execution was issued, but to the time when the lands were sold.

Appeal from *Prince George's* County Court. This was a motion to quash a writ of *fieri facias*, and a writ of *venditioni exponas*, and the returns, &c.

On the 5th of December, 1822, a *fieri facias* issued out of *Prince George's* County Court, on a judgment rendered in the said court in favour of *William Holmes* against *Walter S. Clarke*, to which, at the return day, the sheriff made the following return: "laid as per schedule, and not sold for want of time,"—the schedule returned stated, that he had taken part of *Burgess' Delight*, part of *Clarke's Fancy* and part of *Hickory Thicket*, supposed to contain two hundred and seventy-five acres. A writ of *venditioni exponas*, thereupon issued, commanding the sheriff to sell this property, which he returned "not sold for want of time." *Alias* writs of *vendi. ex.* were issued, the last of which was returnable to October term, 1825, of said court, to which similar returns were made. On the 13th of January, 1826, another writ issued, returnable to April term, 1826, to which the late sheriff made the following return, "made to the amount of five hundred dollars by a sale of the land in the schedule contained to *Francis Belmear* on the 17th of June, 1826, the said lands consisting of part of a tract called *Hickory Thicket*, part of a tract called *Clarke's Fancy*, and part of a tract called *Burgess' Delight*, lying and being in *Prince George's* County; and beginning for the whole, at or near a stone near the main road that leads to the mill now occupied by *Jacob Wheeler*, thence a southerly course, so as to include the dwelling house lately occupied by *Philip Green*, and the orchard contiguous thereto, bounded on the *south* by a line drawn *easterly* to *Patuxent* river, then bounding on the said river, to the extent of said land, on the *north* with said land, to the begining, containing two hundred and seventy-five acres, more or less, being the whole of the said several tracts, of which the defendant, *Walter S. Clarke*, was in possession, at the time of the sale, and the whole of his right, title and interest, in and to the same, being by the aforesaid sale transferred by me to the said *Francis Belmear*, by whom one hundred dollars was paid to *William Holmes* the plaintiff in the judgment at the time, and the balance paid to me by said *Belmear*. *Thomas Osbourne*, *Sheriff*." And the said *Thomas Osbourne* at the time of making said return, filed in court here with the said writ, the following schedule, to wit: "A schedule of the property of *Walter S. Clarke*, taken by virtue of an execution issued out of *Prince George's* County Court, at the suit of *William Holmes*, the property, to wit, part of a tract of land by name *Burgess' Delight*, and part of a tract of land called *Hickory Thicket* and *Clarke's Fancy*, lying in *Prince George's* County, containing two hundred and seventy-five acres, and appraised at ten dollars per acre. Two thousand seven hundred and fifty dollars. *Nathan Waters*, *seal*. *Samuel Waters*, *seal*. Appraised this 17th day June, 1826. Sworn appraisers."

At April term of said court, 1827, *Francis Belmear* the purchaser, moved the court for a writ of *habere facias possessionem*, to put him in possession of the property so by him purchased, which was accordingly ordered, and issued returnable to October term, 1827, when the sheriff returned "possession delivered," which said writ at that term was on the motion of said *Clarke* quashed by the County Court, in consequence of not describing with sufficient certainty the lands, of which possession was to be delivered, the said *Walter S. Clarke* then moved the court, that said writs of *fieri facias*, and *venditioni exponas*, and the returns thereto be quashed, and at the same time filed the following reasons: 1. For that the description of the lands in the said writs and returns is uncertain, and consequently the executions are void. 2. Because the description of thelands in the return of the *fi. fa.* which was first sued out in this cause, upon which return, the *v.e.* is predicated, is uncertain, and the writ aforesaid consequently void.

This motion was overruled by the County Court, and a second *habere facias* ordered.

The defendant *Clarke* appealed to the Court of Appeals.

The cause was argued before **Buchanan**, Ch. J. and **Earle**, **Martin**, **Archer** and **Dorsey**, J.

A. C. Magruder and *J. Forrest*, for the appellant contended, 1. That the *fieri facias* was void for uncertainty, and that the court erred in adjudging a second writ of possession to be issued. 2. The court erred, because the act of Assembly upon which the writ of *habere facias possessionem* issued, was not in force, when the levy under the *fieri facias* was made, nor when the writ of *venditioni exponas* issued, and it would be giving an *ex post facto* operation to the law to make it applicable to cases of property already taken in execution. 3. Because the sale was made after the return day of the writ of *venditioni exponas*. On the 1st point they referred to *Underhill vs. Devereaux*, *2 Saund.* 69, *a* (*note* 2.) *Pullen vs. Purbeck*, 12 *Mod.* 355. *Williamson vs. Perkins*, 1 *Harr. and Johns.* 449. *Hammond vs. Norris*, 2 *Harr. and Johns.* 147. *Berry vs. Nicholls*, *Ib.* 508. *Fitzhugh vs. Hellen*, 3 *Harr. and Johns.* 206. *Thomas vs. Turvey*, 1 *Harr. and Gill*, 435. *Fenwick vs. Floyd*, *Ib.* 172. On the 3d point they referred to *Barney vs. Patterson*, 6 *Harr. and Johns.* 182.

Stonestreet and *J. Johnson*, for the appellee.

The sale took place on the 17th of June, 1826, and the writ of *habere facias possessionem*, under the act of 1825, *ch.* 103, was moved for, and ordered at April term, 1827, returnable to October term, 1827. The act of 1825 gives the party one entire term, and four days of the succeeding term, to show cause against the issuing of the *habere facias*. This time expired before the writ was ordered. The act of 1825 says nothing about the time the issuing of the writ under which the sale is made. If the *sale* is made *after* the passage of the law, the purchaser is entitled to his *habere*, by the express terms of the statute; although the writ under which it may be effected is sued previously. On the *first* point, they contended, that the *fieri facias*, and their return thereto, the several writs of *venditioni exponas*, and their returns, should be connected together, and so considered they present a perfect levy and sale, and the lands sold are sufficiently described. In *Thomas vs. Turvey*, 1 *Harr. and Gill*, 435, one of the schedules described the land correctly, and it was adjudged sufficient to cure the defects of the rest. It is the sale and not the return which transfers the title, 6 *Harr. and Johns.* 182. The return is only useful as evidence of the sale, and may be dispensed with if there be a note or memorandum in writing—the sheriff may correct his return if he ask leave to do so in due time, *Berry vs. Griffith*, 2 *Harr. and Gill*, 337. But it is too late now to move to set aside the return to the *fieri facias*, if it is defective—the application should have been made immediately upon its return, or at all events upon the return of the first *venditioni exponas*. *Dand vs. Barnes*, 1 *Serg. and Low*, 291. (6 *Taunt.*) *Fletcher vs. Wells*, *Ib.* 352. (6 *Taunt.* 191.) Four years intervened between the issuing of the *fieri facias* and the *venditioni exponas* under which the sale was made, and eighteen months between the sale and the present motion. The County Court at April term, 1827, by ordering the *habere*, adjudged the sale and returns valid, it was therefore too late at the ensuing October term to bring the same question before them, they could not interfere with a judgment pronounced by them at a preceding term. *Jacob L. D.* tit. *term*, 212. *Munnikuysen vs. Dorsett*, 2 *Harr. and Gill*, 374.

Martin, J. delivered the opinion of the Court.

After recapitulating the facts as set out in the commencement of the report of this case, the Judge proceeded to state, that from these proceedings *Clarke* has appealed and contends, 1st. That the writs of *fieri facias* and *venditioni exponas* and the returns made to them are void for uncertainty; and 2dly. If they are sufficient, *Belmear* was not entitled to the writ of *habere facias possessionem* under the act of 1825, as the lands were in execution prior to the passage of that act.

The description of the property contained in the schedule returned by the sheriff to the *fieri facias* was, "*part* of *Burgess' Delight*, part of *Clarke's Fancy*, and part of *Hickory Thicket*, supposed to contain 275 acres." Did the case rest upon this return alone, we should not consider it open for discussion. It has been solemnly determined by many adjudications of this court, that such a return is not sufficient, that it would be quashed on motion, and would be unavailable in an ejectment to prove title in the plaintiff. *Williamson vs. Perkins*, 1 *Harr. and Johns.* 449. *Hammond vs. Norris*, 2 *Harr. and Johns.* 147. *Fitzhugh vs. Hellen*, 3 *Harr. and Johns.* 206. *Fenwick vs. Floyd*, 1 *Harr. and Gill*, 172. *Thomas vs. Turvey*, 2 *Harr. and Gill*, 435.

But it does not rest upon this return alone; the sheriff having returned he had not sold the lands under the *fieri facias* for want of time, a *venditioni exponas* was issued, commanding him to sell the lands before taken by him, under the *fieri facias*,—to this *venditioni* he makes a special return, stating in substance, that he had sold the lands before taken in execution, under the *fieri facias*, gives a description of those lands by metes and bounds, and that *Francis Belmear* became the purchaser for $500, which sum had been paid by him. The question then arises, whether the purchaser is not entitled to the benefit of *both* those returns to shew the description of the lands he had purchased under them? This was a judicial sale, and the purchaser claims title under the whole proceedings, embracing both writs and returns. The *fieri facias* is the effective writ in these cases, it not only authorises the sheriff to seize, but to sell, very different is the office of a *venditioni exponas*. That confers no new power to the sheriff; it does not authorise him to do any act, that he might not have done under the *fieri facias*. It is only a mandatory writ, and directs him to carry the *fieri facias* into effect, by selling the lands taken in execution under it, and when the lands are sold, the return to the *venditioni* relates to, and in legal effect, becomes part of the return to the *fieri facias*. Suppose in this case the sheriff had sold the lands under the *fieri facias* without the aid of a *venditioni exponas*, and had returned that he had sold the lands in the schedule mentioned, which lands were contained within certain metes and bounds set out in the return to the sale, can there be a doubt that the return thus correctly describing the lands would not be sufficient, to give certainty to those mentioned in the schedule? If then the description in the schedule might be corrected by the return to the sale, if made immediately under the *fieri facias*, it cannot be perceived why it should not be received for that purpose, when made to a *venditioni exponas*, whose only office is auxiliary to the *fieri facias* and to carry it into effect. The purchaser claims title under the united effect, of both those writs, and if certainty is the object to be attained, he has a right to resort to the whole judicial proceedings, under which his title accrued to ascertain it.

It has been contended that the description of the lands in the return to the *venditioni exponas* is not sufficiently certain, to ascertain the location of them. That they might have been described with more accuracy cannot be doubted, but we think there is sufficient certainty, to enable the party to make a true location of them.

The second objection to the proceedings of the court, that these lands were taken in execution prior to the act of 1825, *ch.* 103, cannot avail the appellant. The right of the party to obtain a writ of *habere facias possessionem* under that act, does not relate to the time the execution was issued, but to the time when the lands were sold, and it appears from the record, the lands in this case were sold on the 17th day of June, 1826, long after the passage of the act.

JUDGMENT AFFIRMED.

STATE use OYSTER *vs.* ANNAN.—*December*, 1829.

The bond of a Trustee appointed by the Chancellor to sell the real estate of a deceased person, for the payment of his debts, is not liable to be put in suit, after the Trustee has sold the deceased's property, and received the money therefor, upon the order of the Chancellor distributing such proceeds among the creditors, *without* notice to the Trustee of such distribution.

APPEAL from *Frederick* County Court. This was an action of debt on a Trustee's bond, under a decree of the Court of Chancery, brought by the appellant on the 18th of February, 1820, pleas general and special performance. The following statement of facts was agreed upon by the parties. "It is admitted the defendant regularly made and executed the writing obligatory mentioned in the declaration in the following words, to wit:" Know all men by these presents, that we *Robert L. Annan*, *William Long*, *Jacob Winter* and *Philip Nunnamaker*, all of *Frederick* County and *State of Maryland*, are held and firmly bound unto the said *State of Maryland*, in the full and just sum of four thousand pounds current money, to be paid to the said State, to the payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 28th day of January, 1808. Whereas by a decree, of the high Court of Chancery passed at December term, 1807, the above named, *Robert L. Annan* and *William Long*, were appointed trustees to sell the real estate of *Solomon Kephart* late of *Frederick* County, deceased, for the payment of his debts, as by the said decree, reference being thereto had will appear; now the condition of the above obligation is such, that if the said *Robert L. Annan* and *William Long*, do and shall well and faithfully perform the trust reposed in them by the said decree, or to be reposed in them by any future order or decree in the premises; then the obligation to be void, &c.

"That before the making the said writing obligatory to wit, on the 28th day of December in the year of our Lord one thousand eight hundred and seven, it was by the honourable the *Chan-*

cellor of the *State of Maryland* on the petition of the creditors of a certain *Solomon Kephart*, deceased, upon a bill filed by them against his heirs at law, adjudged, ordered and decreed, that the real estate of the said *Solomon Kephart*, should be sold to pay his debts. And in the said decree, *Robert L. Annan* the defendant in this cause, and a certain *William Long*, were appointed trustees for the purpose of selling the real estate of the said *Solomon Kephart*, deceased, to raise money to pay his debts, that the said *Robert L. Annan* and *William Long*, accepted the said trust, and executed and made the writing obligatory aforesaid for their trust bond, which was filed in the Chancery Court and approved by the Chancellor, that in the said decree the said *Robert L. Annan* and *William Long*, were directed to proceed to sell the said real estate of the said *Solomon Kephart*, deceased, and were also directed to bring the money arising from the said sale or sales, under the said decree, into the Chancery Court, to be applied under the directions of the Chancellor, or pay it away under the direction of the said Chancellor, after taking out the commission to be allowed the trustees, and the costs of the suit; that the said defendant and the said *William Long*, on the 7th day of March, 1808, made sale of part of the said real estate of the said *Solomon Kephart*, deceased, amounting to $1437, and made a report thereof to the Chancellor. That upon the petition of the creditors of the said *Solomon Kephart*, being again presented to the Chancellor, he did by another order and decree, direct the said *Robert L. Annan* and the said *William Long*, to make a further report of their proceedings, and of the situation of the said real estate of the said *Solomon Kephart*; that the said *Robert L. Annan* and *William Long*, in obedience to the last mentioned order and decree of the Chancery Court, did on the 8th day of April, 1815, after the copy of the said order and petition was served on them, sell the balance of the real estate of the said *Solomon Kephart*, and made report thereof to the Chancery Court, amounting to the sum of $952. That the said *Robert L. Annan* and *William Long*, received the whole purchase money from the purchasers, both at the first and second sale, but never brought any part of it into the Chancery Court, and never paid any of it away under the direction of the Chancellor. That the Chancellor did regularly order and direct the auditor of the Chancery Court, to state and report an account between the estate of the said *Solomon Kephart* and the said *Robert L. Annan*, and the said *William Long;* that the auditor of the said court in obedience to the said order of the Chancellor, did state an account as aforesaid, and did report the same to the Chancellor, in which account after taking out the commission to the trustees, and their part of all expenses in both sales, and the costs of the Chancery Court, he did distribute the balance to the creditors according to their respective claims, which account, distribution and statement, was afterwards confirmed, and the proceeds of the sales of the said real estate applied according to the statement and distribution made by the said auditor, as appears by exhibit C, made a part of this statement and contained in the following words viz."

Here follows the auditor's report, shewing the claim of *Jacob Oyster*, marked No. 3, to amount to $346 36, his proportion as distributed by the auditor, amounting to $48 88, and the Chancellor's order thereon, confirming the same and directing the proceeds to be applied accordingly, dated January 18th, 1820.

"That the said auditor in distributing the proceeds of the sales of the real estate of the said *Solomon Kephart*, deceased, has given to the plaintiff in this cause as one of the creditors of the said *Solomon Kephart*, as his dividend, the sum of $48 88, as appears in the paper marked C, and the Chancellor by his said order has directed the defendant *Robert L. Annan*, and also the said *William Long*, trustees as aforesaid, to pay to the plaintiff in this action the said sum of $48 88, as aforesaid, with interest in proportion as it has been or may be received. That after all the proceedings aforesaid, the plaintiff in this action brought suit in the name of the *State of Maryland* for his use against the said *Robert L. Annan*, the defendant, on the said bond given by him as one of the said trustees for the faithful performance of his trust, to recover his distributive share of the proceeds of the sale of the real estate of the said *Solomon Kephart*, with interest thereon as aforesaid. It is admitted that no part of the money due to the plaintiff as aforesaid has been paid by the defendant or any other person. It is admitted that the Chancellor of *Maryland*, at the time he passed said order on exhibit C, had full and competent authority to pass said order, and the same was legally passed by him. If upon this statement of facts the court shall be of opinion that the plaintiff is entitled to recover, judgment is to be entered up for the plaintiff for the penalty of the bond to be released on the payment of the sum of $48 88, with interest in proportion as it has been or may be received, and costs of this suit. If the court shall be of opinion that the plaintiff is not entitled to recover, the judgment of *non pros* is to be entered. Both plaintiff and defendant reserves the right of taking an appeal to the Court of Appeals upon the judgment of the court."

On the above statement, the County Court gave judgment for the defendant, and the plaintiff appealed to this court.

The case was submitted on notes.

Boyle and *Pigman* for the appellant. The only point in the cause, is whether the plaintiff was bound to give notice to the defendant, of the Chancellor's order to pay the money, and demand it, before he can maintain his action on the trustees bond?

The case stands upon a statement of facts agreed to by the plaintiff and defendant. This case will settle a very important principle, and rule of practice, as to the right of suing on administration bonds.

The bond will be found in the record, and the courts attention is called to the condition. It is the usual condition for the performance of duties imposed by the original decree, or that may be put upon the trustees by any future order by the Chancellor. The condition does not provide that notice shall be first given of the decree, or order, before action shall be maintained. It was therefore no part of the undertaking or contract, that notice should be given to enable a distributee to maintain his action. The Chancellor's order does not require notice to be given at all—what then makes notice necessary to enable the plaintiff to maintain his suit? There is no law requiring it; you must amplify the law, the contract, and the order of the Chancellor, before you can require any further notice of the cause of action, than was given by the writ of *capias* which originally issued in the case. The rule as to notice to be given by one party to another before action, is this; where the thing is more in the knowledge of the plaintiff than defendant, plaintiff is bound to give notice, but where each party have the same knowledge, notice is not necessary; for the cases on this point, the court is referred to 1 *Chitty Pleadings*, 320. Now the dispute in this cause is between trustees, officers appointed by the Chancellor, and one of the distributees. The Chancellor orders the auditor to state an account current between the trustees, and the estate of *Solomon Kephart.* This the auditor does, and after taking out costs, &c. distributes the money among the creditors, and reports to the Chancellor, who confirms his report. The plaintiff sees the sum of $48 88, distributed to him, as one of the creditors, he knows by enquiring, and the defendant might have known the same, by adopting the same means. It is true that it is usual, when the Chancellor intends to bring an individual into contempt for disobeying his order, to insert a provision to give notice by serving the order. But the order in this case was to enable the distributees to sue the bond if the money was not paid. Cases may be found in *England* where notice is necessary to bring the party into contempt for disobedience, as for not bringing money into court, &c. But our form of trustees bond is peculiar, and the rights of the parties are defined in the condition, and the Act of Assembly under which it is given.

F. A. Schley for appellee.

In this case the defendant and *William Long* were appointed by the Chancellor, trustees to sell the real estate of *Solomon Kephart* to pay his debts, and they executed their joint and several bonds with *two* securities, conditioned to perform the trust reposed in them by the decree, or to be reposed in them by any future decree or order in the premises. The decree directs the trustees to bring the money into court arising from the sale, "*or to pay it away under the direction of the Chancellor.*" The land was sold in 1815. The creditors being numerous, eighty-two in number, were litigating their claims in Chancery for years, and did not get them adjusted until 1820. On the 18th January, 1820, the auditor made his report, and it was finally ratified, and the trustees ordered to pay over the proceeds of sale accordingly. Of this order the trustees had *no notice*, whatever, they residing twenty miles beyond *Frederick*, and the order passed at *Annapolis* by the procurement of the counsel for the creditors, as soon as the order was passed, the counsel for the creditors to the number of eight or ten, got a copy of the auditor's report, and without informing the trustees of it, or affording them any opportunity to discharge their trust, he immediately issued *four separate* writs, in each case against the two trustees and their two securities, on behalf of each of these eight or ten claimants, making from thirty-five to forty suits, to recover the amount of these claims. The writs were issued on the 20th February, 1820. *No notice* was given to the trustees of the Chancellor's order, and no *demand* made upon them for the money. The service of the *writs* was the *first* notice they had that the plaintiffs were even creditors of *Kephart*, whose estate they had sold. Nor did they know this until they went to the plaintiff's counsel, to see a copy of the audit.

The question is, were the trustees entitled to *notice* from, or a demand by the creditors before they were liable to be sued? Or has the creditor the right, *immediately* on the ratification of the sale to institute a suit on the trustees bond, without any notice or demand, or any opportunity afforded them to pay without being sued?

This question is *res integra* in *Maryland*. The court, and that too of the last resort, are now, for the first time called on to settle the law in this State, as to the liability of trustees appointed by the Chancellor. It is an important question, as its decision will prescribe the duties, and fix the liabilities of a numerous class of *agents*, which the interests of creditors, and the convenience of our courts make necessary.

The sale of lands by trustees in the country, instead of a sale in the Chancery office, by a master in Chancery, is a great convenience and of great advantage to the parties concerned. Instead of being made in the Chancery office as in *England* and *New-York*, it is made on, or in the immediate neighbourhood of the property, where it is best known, and bidders most likely to attend. The court should therefore be cautious to establish no rule, which by its oppressive operation would be likely to deter persons from becoming trustees. "It is a rule of law founded on the first principles of natural justice, that no judgment shall be pronounced against one who has *not* had *notice* given of the proceedings, and had an *opportunity* to defend himself." 2 *Stark. Ev.* 977. "Trustees acting *bona fide* are always treated with liberality and indulgence." 4 *Johns. Ch. Rep.* 628, 629. Would the court establish a rule under which a trustee could by no ordinary and practicable diligence, and with fair *bona fide* intentions to execute his trust, protect himself from costs and losses which would be ruinous?

If such a rule is established, who would assume the unreasonable and ruinous responsibility of a trustee? Creditors frequently become restless and querulous, when they can not get their claims adjusted in Chancery, and charge the delay on the trustee, although he has nothing to do with the adjustmeut of the claims. It is the duty and the act of the creditors. The adjustment as to the trustee, is, *res inter alias acta.* He is no *party*, and can in no way interfere. In this state of dissatisfaction all might sue the trustee, *as soon as the order was passed*, and ruin him by costs without affording him the *opportunity* to comply with the order although ready, willing and anxious. This would be strange indulgence and tenderness to trustees!! In *England* as in this State, a Court of Chancery enforces its orders, and decrees, by attachment, &c. The party, however, must first be in contempt, but he cannot be in contempt, until he refuses to perform the order or decree, and he cannot refuse until he is called on to perform. "And this must always be done by *serving a copy of the order* or decree on him, to give him the *oppor-*

tunity to perform." *Wyatt's Prac. Reg.* 298. *Hindes' Prac.* 494. 1 *Harr. Ch.* 443. 2 *Harr. Ch.* 141.

This rule is founded on common sense and common justice. Money paid into court, cannot be withdrawn by the person entitled, unless under an *order* for that purpose, which must be *served* on the accountant general. *Wyatt*, 284. 2 *Harr. Ch. Prac.* 142. In *Maryland*, the money if deposited in bank, could not be drawn out by a creditor or person entitled, except by an application to the Chancellor, who would order a check on the bank, or rather, order the cashier of the bank to pay the money. This order or check, must be *served* or *presented* to the cashier, and is *notice* to the bank.

If ready and willing to pay, he ought to have the *opportunity, afforded* him. Sheer justice demands this, to say nothing about equity. The party or creditor has two remedies; he may either proceed by way of attachment against the trustee *alone*—or he may sue on the bond and include the securities.

In *either case*, however, the trustee must be *in default.* He must have done that which would amount to a refusal to obey the court's order, to *a contempt* of the court. If a suit is brought, there must be an averment in the pleadings that the trustee *had notice* of the Chancellor's order. See the pleadings in a similar case, in *3d Johnson's Cases*, 53, *The People vs. Bryan.*

In all cases of a similar kind found in the books, *notice* of the order is *averred*, either in the declaration, or replication.

An attorney, who is an officer of the court, cannot be sued for money in his hands as attorney, until *a demand* is made upon him, and he has thus an opportunity afforded him to pay out. 5 *Cowen. Rep.* 376. And in this case he is called *a trustee* by the court. He holds the money in his fiduciary character. Can the trustee be considered as any thing more than an agent of the court? The Court of Chancery have so decided, and have said, that in the sale of lands, he is the mere *agent* of the court, and the contract not binding on the court until they have ratified it. He is then nothing more than the agent to make the sale, and the *agent* to pay away the money. If so, then he is protected by the settled principles of law, that "an *agent* or factor selling goods consigned to him, cannot be sued, *until* he is ordered *how* he is to pay it, to whom he is to pay it, and has *refused* or neglected. 10 *Johns. Rep.* 285. See the precedent of a declaration in such cases, 3 *Chitty Plea.* 178, 179. If goods are consigned to a factor to sell on commission, there must be *a demand* by the principal for the money of those sold, and for the goods unsold. And an action does not lie against him for not accounting, till *after a demand made* for an account. 1 *Taunt.* 572. The condition of the bond is to perform the trust reposed in them, or to be reposed in them by any future *order* or *decree*—the decree to pay away the money arising from the sale, under the direction of the Chancellor. How can the trustees know what the *further order* of the court is, or what are their directions until such order or directions are *shewn* to them, and that too by the parties entitled to the benefit of the order, and competent to receive and *release.* The trustees do not stand in the relation of debtors and creditors. They are the mere *agents* of the court. The *hands* by which the court for its own convenience, and the convenience, and very great convenience too of creditors, pay away funds under its controul. As before observed, the adjustment of the creditors claim, is, as to them, "*res inter alias acta.*" They are not *parties* and can in no way interfere. They cannot even know who are the claimants, until the audit is closed and ratified.

The *argumentum ab inconvenienti*, applies with resistless force; for if the trustees are to be regarded as debtors to the creditors, then they must seek out the creditors. They must go to every county in the State, or every state in the Union, nay, to *Europe* itself, if the creditors are thus dispersed, to pay them; otherwise to be subjected to suits and costs. Costs that would be absolute ruin to them. In this case, we see the ruinous consequences which might be visited upon these trustees, although ready and willing to pay.

There are eighty-two claims. Each claimant may bring four suits, the bond being several. This would make the aggregate of three hundred and twenty-eight suits, which at five dollars and fifteen cents to each, would produce an aggregate of costs equal to *one thousand six hundred and ninety-eight dollars and twenty cents!!* And this too is the *lowest* amount of costs the trustees could escape with, if they were to go to each creditor and pay them as soon as the writs were served. The court will see that the claim of *Jacob Eversall* in only $16 10. *John Sawyer*, $19 12, for which suits were brought, and if the trustees are compelled to pay the costs of these suits, they will amount to more than the principal, that is, the costs in each case will amount to $22 60.

There is one of the claimants, named *John Kennedy*. This claim amounts to nineteen cents, now, can it be possible that the trustees could be compelled to ride over the State to find *Mr. Kennedy* to pay him these nineteen cents, or be liable to be sued with four writs, and made to pay $22 60 costs. Impossible!

The whole net amount of sales is only $2075. Yet, if all the claimants had sued, as soon as the audit was ratified, the trustees might have been compelled according to the plaintiff's idea, to pay nearly the whole of this sum in costs. If the trustees are not entitled to *notice*, to the service of a copy of the audit, or the Chancellor's order, they *cannot* protect themselves from these ruinous consequences, no, not even though they take their seats at the Chancellor's *elbow*, and wait there for years, to know when the order will be passed; for if they go to pay a creditor in *Baltimore*, *Finley and Taylor*, for instance, they may be sued while they are in the act of paying there, by the present very vigilant plaintiffs in *Frederick*. No willingness, no diligence, no readiness to pay can save them; it is morally *impossible* for them to protect themselves from ruinous costs, if the creditors are so disposed, and yet, I have always understood it to be a maxim of the law of common sense and common justice, that *lex neminem cogit ad impossibilia*. If it be said that trustees may relieve themselves from these difficulties, these ruinous consequences, by paying the money into court. The answer is, that this would produce such great inconvenience to creditors, that all the benefit arising to creditors and others, from trustees residing near them and near the property sold, would be lost. The creditors, though residing in *Alleghany* or *Worcester*, would have, each one, to go to *Annapolis* to the Chancellor for a check or order, for the amount of his claim, however small. I cannot believe the court will establish a rule producing such serious inconveniences to suitors and claimants, when a rule obviating every inconvenience to *all* parties, and based upon reason, equity, and sheer justice, is equally in their power. Surely a creditor ought to be satisfied, and can have no right to complain if he is paid his money when he asks for it. Surely a trustee ought to be protected, both by courts of law and courts of equity—for they are both *courts of justice*—when he has acted *bona fide*, when he is ready, willing and anxious to discharge his trust; when he says, present me the order that I may know what it is, and to whom I am to pay, and I am ready to perform—the money is in my pocket, and has been there for some time waiting for this order. The condition of the bond is, to perform the trust reposed in them. The court, in ascertaining whether they have violated the condition by not performing the trust, will give to their acts a reasonable construction. They will, before they will suffer a suit to be sustained, ascertain and be satisfied that the trustees have been in *default*, and although they do not, being a court of law, proceed by way of attachment, yet, as the Chancellor would not have granted an attachment until the trustees were in *default*, and he would never consider them in default for a disobedience to his order, until they know what that order was, so a court of law will construe the trust, and ascertain the duties and default of the trustees by the same rules of reason and justice, and will not consider the acts of the trustees as a breach of the trust, so as to subject them and their securities to suits on the bond for the penalty, unless on the same evidence, if they were sitting as Chancellors, they would grant an attachment. The court in ascertaining the duties and obligations of parties, are always governed by rules of justice and reason. Thus when a party endorses a note, he does not specify in his contract that he shall have *notice* of the non-payment by the drawer, before he will be bound, yet the courts in fixing his liability, in construing his contract have said, it is reasonable that he should have *notice*, and if the holder does not give it to him, he is not bound by his endorsement—he is not liable to be sued. So in the case of notes and accounts assigned to another in payment of debts, it has been held by the courts, that the assignee must use due diligence in the collection of them, or the assignor is not answerable on the original, because they say it is reasonable that such diligence should be used for the *protection* of the assignor. And so in many other analagous cases, the court in fixing liability, and ascertaining and determining what shall constitute a breach of duty, and what not, are influenced by the principles of reason and justice. The trustees in this case only ask to have their duties ascertained by these principles, believing as they do, that they will not convict them of a breach of trust in the non-performance of an order, the existence of which they never knew, and the performance of which they never refused, and the knowledge of which they could not have procured by any ordinary diligence, to save themselves from the clouds of suits with which they are covered, every one of which they would have prevented, if the creditors had only called on them for their money, or given them notice that the audit was made out.

The court are to say what were the *duties* of these trustees, in the *proper* discharge of their trust, what it was reasonable, and right, and equitable to expect of them. They are, by their bond, to perform the *trust* reposed in them. Did this trust require them, *as soon* as the audit was made out, to take it in one hand and the trust fund in the other, and ride through the country, State, or United States, as the creditors might be dispersed, to pay each one his claim? If it did, then they are liable to this suit, and might be sued in one hour after the Chancellor's order, by one hundred creditors, if there were so many, and totally ruined, *uno flatu*. But if, on the contrary, the trustees are entitled to *notice* of the order; if they are entitled to an *opportunity* to pay, by having the order shewn to them by the person entitled to receive, or his agent or attorney, who may be authorised to give a receipt or release. If they are to be as much favored as the bank, which holds the funds of the Court of Chancery, if they are not to be required to do more than to use ordinary diligence, to act *bona fide*, and to be ready and willing to pay whenever called on, or whenever the courts order, which they are to obey, is shewn to them by the party entitled to receive and *release*. If, in truth, they are not to be required to perform impossibilities, then they are not liable to the suits which have been brought against them, of which the present is one.

Earle, J. delivered the opinion of the Court.

This suit was brought by a creditor on the bond of a trustee appointed by the Chancellor, to sell the real estate of a deceased person for the payment of his debts. The statement agreed on between the parties gives a full account of the proceedings of the trustee in Chancery, from the acceptance of his trust, to the confirmed report of his sale, and the Chancellor's order of distribution of proceeds among the creditors. The action was instituted within a month after the order, and the complaint is that the plaintiff's proportion of the avails of the sale was sought without giving to the defendant, any previous notice of the final proceedings of the Chancellor.

We have given to this case a further consideration, and after an examination of the authorities, we are inclined to think our first impressions of it were not correct. The trustee as to the suit is not in the situation of a common debtor, who knows his liability, and whose business it is to look to a compliance with his engagement; nor is his predicament like that of an executor or administrator, who represents the deceased testator, or intestate, in all and each of his contracts, and to whom the creditors individually are to exhibit their claims for settlement. The creditors are known to the trustee but through the medium of the Court of Chancery, where they file their respective demands to be adjusted by the auditor, and where disputes among them are disposed of by the Chancellor, who finally determines what proportion of the sum of money reported, is to be paid to each of them. This proceeding as to the trustee, is *res inter alios acta*, and it is but reasonable that when it terminates he shall be notified of the result, before any steps are taken against him, either by attachment, or by action on his trustees bond, against him, and his sureties. In the case of an order for distribution and payment, similar to this, to sustain the plaintiff's suit, it appears to us therefore, that he ought to aver and prove a service of the order on the trustee, and a demand of payment of the sum specified therein; and that without this notice so averred in the proceedings, an action on the trustees bond cannot be maintained. *Vid.* 3 *Johns. Cases*, 53.

The court mean to confine this decision to an order for distribution and payment by the Chancellor, and with this understanding the judgment of the court below is *affirmed.*

JUDGMENT AFFIRMED.

CRANE *vs.* MEGINNIS—*Court of Appeals*, *Eastern Shore*, *June term*, 1829.

The constitution of this State composed of the declaration of rights, and form of Government, is the immediate work of the people in their sovereign capacity, and contains standing evidences of their permanent will. It portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise, and specifying that, from the exercise of which it must abstain.

The public functionaries move in a subordinate character, and must conform to the fundamental laws or prescripts of the creating power. When they transcend defined limits their acts are unauthorised, and being without warrant, are necessarily to be viewed as nullities.

The legislative department is nearest to the source of power, and is manifestly the predominant branch of the Government. Its authority is extensive and complex, and being less susceptible on that account of limitation, is more liable to be exceeded in practice.

Its acts out of the limit of authority assuming the garb of law, will be pronounced nullities by the Courts of Justice; it being their province to decide upon the law arising in questions judicially before them, and upon the constitution as the paramount law.

The check to legislative encroachments is to be found in the declaration, that the legislative, executive and judicial powers, ought to be kept separate and distinct; and the solemn obligations of fidelity to the constitution under which all legislative functions are performed.

Divorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light, than as regular exertions of legislative power.

The suit for alimony in this State is a distinct remedy from the proceedings to obtain a divorce, and for a series of years the wife's maintenance has been recoverable through the intervention of our judicial tribunals.

A divorced wife may recover, (having merits) a maintenance suitable to her station in life, and to quadrate with the situation of her husband, by a bill in Chancery.

The 3d section of the act of 1823, *ch.* 95, by which the legislature required a husband to pay a trustee for the use and benefit of his wife, from whom such act divorced him, a sum certain annually, is an exercise of judicial authority, repugnant to the constitution of *Maryland* and void.

Appeal from *Kent* County Court. This was an action of *Assumpsit*, brought by the appellant as trustee of *Mary Meginnis*, to recover the sum of $150, being the first semi-annual instalment of an annuity directed by an act of the General Assembly of *Maryland*, to be paid the said appellant by the appellee, for the use of the said *Mary*.

The declaration stated, "that whereas heretofore, to wit, at a session of the General Assembly of *Maryland*, begun and held at the *city of Annapolis*, on the first Monday of the month of December, in the year 1823, by a certain act of the said General Assembly, entitled 'an act for the relief of *Mary Meginnis*, it was amongst other things enacted, that the said *Casparus Meginnis*, should from the passage of the said act, be and he was thereby altogether deprived, of all and every interest, authority, power and control in, over, and to the person of *Mary Meginnis*, his wife, as fully as if she had never been married; and that the said *Mary* should be, and she was thereby declared capable to have, hold, take, receive, sue for, and recover, by compromise, suit or suits, in law or equity, property of any kind whatever, real, personal, or mixed, in as full, and ample a manner, as if she was a *feme sole*, and to use and enjoy, or dispose of the same, at her will and pleasure, and might in her own name sue and be sued as if she was a *feme sole;* and the said *Casparus* should annually thereafter pay to the said *John Crane*, who was thereby made trustee in that behalf, to and for the use and benefit of the said *Mary*, the sum of $300, in two equal instalments, the first on the first day of March, and the second on the first day of September, in each and every year, during the joint lives of the said *Casparus*, and *Mary*, and the said trustee should be authorised to institute suit in his own name for any instalment, which should not be paid on the day on which the same was thereby declared to be due, and it should be the duty of the court before whom the suit was brought to try the same at the term to which the writ was made returnable; and that the said *Casparus Meginnis*, should not be liable for any debts to be thereafter contracted by the said *Mary;* and that the annuity thereby directed to be paid should cease on the death of the said *Casparus* or *Mary*, whichever of them should first die; and that nothing therein contained should in any manner prevent the said *Mary*, if she should survive the said *Casparus*, from claiming the part or share of his estate, real, personal or mixed, which she would be entitled to, if the said act had not passed: And that if the said *John* should die or refuse or neglect to act as trustee, it should, and might be lawful for the *Orphan's* Court of *Kent* County, on the application of the said *Mary*, to appoint a trustee for her benefit, who should thereafter be invested with all the authority thereby given to the said *John*, as by the record of the said act of Assembly remaining of record in the office of the Clerk of the Court of Appeals for the Western Shore, may more fully and at large appear; and the said *John* in fact saith, that after making of the said act of Assembly, the said *John* took upon himself the execution of the said trusteeship, and that the said *Casparus* and *Mary* both continued in full life from and after the passage of the said act of Assembly, until the first day of March in the year 1824, and still are in full life, to wit: at *Kent* County aforesaid, by reason whereof, &c. To this declaration the defendant demurred generally, and the plaintiff joined in demurrer. A *pro forma* judgment was rendered by the County Court on the demurrer for the defendant, and the plaintiff, appealed to the Court of Appeals.

The cause was argued at June term, 1828, before EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Chambers for the appellant,

The objection urged against the act of 1823, *ch.* 95, in virtue of which the action was instituted, was understood to arise out of the 10th sect. of the 1st article of the Constitution of the

United States, which prohibits the passage by a State Legislature, of "any *ex post facto* law, or laws impairing the obligation of contracts."

The act of 1823, is certainly not an *ex post facto* law. Such a law has relation to *acts* of a party, not to rights of property: an enactment which makes that a crime which was not a crime, at the period of its commission. *Vid Celdon and wife vs. Bull and wife, 3 Dal.* 386. The exposition by Judge Chase and Judge Patterson as to this provision.

Nor does this act impair the obligation of any contract within the meaning of the constitution. Contracts relating to money and property were those only which it was intended to include in these expressions. Marriage contracts were never contemplated. It has not heretofore been questioned, and is not now, that the legislature can grant a divorce, even a divorce *a vinculo matrimonii*, which not only impairs but destroys the marriage contract. It is one of those matters of internal police, which the interests of society require should be fit matter for legislation, and which the States never could have designed to transfer to the general government or to surrender. It has been exercised at all times, and in most, if not all the States. If then the right to grant divorces be vested in the legislature, it is necessarily an incident to its useful exercise, that there should also be power to express the terms of the divorce, to arrange matters of property for the future subsistence and comfort of an injured wife. The same solemnity, and the same obligation could be urged for the protection of the marital rights, which could be urged for the protection of the rights of property. The reason is not perceived why one may be invaded by legislative interposition, and the other be exempt. Accordingly, we find such to be the uniform practice of the legislature, who have by the same act, assumed jurisdiction over the estates of individuals so far as to make proper provision for their future pecuniary comfort. Practice and acquiescence fix the construction, and courts will not afterwards allow it to be disturbed. 1 *Cranch*, 299, *Steuart vs. Laird*. A variety of laws from an early period of our history, will be found in the statute book, and indeed, for many years, the law of 1818, *ch.* 203, enacted when some of the most distinguished legal characters in the State were members of the legislature, has been a sort of *formula.*

Should it be urged that this act assumes powers, as belonging to the legislative department of the government, which rightfully belongs to the judicial tribunals, and therefore opposed to the Maryland Bill of Rights, which declares they shall be kept separate and distinct, a great number of acts may be referred to, in which judicial power to the same extent has been exercised and sustained. In the case of *Garrettson vs. Cole*, 1 *Harr. & Johns.* 391, the court paid respect to a law empowering the Court of Appeals to reinstate a cause after its decision.

Should a difficulty be made, because of the summary process provided in this act, the court will find it obviated by the case of *Bank of Columbia vs. Okely*, 4 *Wheaton*, 235.

Spencer and *Bayly* for the appellee, referred to 2 *Burns Ecles. Law*, 434. 3 *Bla. Com.* 94. 1 *Fonb. Eq.* 90, *note* 104. *Duncan vs. Duncan*, 19 *Ves. Jr.* 397. *Galmith vs. Galmith*, 4 *Harr. & McH.* 477. *The Act of* 1777, *ch.* 12, *sec.* 4. *Watkyns vs. Watkyns*, 2 *Atk.* 97. 6 *Article Bill of Rights.* 18 *Article Bill of Rights. Whittington vs. Polk*, 1 *Harr. & Johns.* 236, 242. *Vanhorne's lessee vs. Dorrance*, 2 *Dall.* 304 to 307. 1 *Bay's Rep.* 252, 382. 21 *Article of the Constitution. Act of* 1676, *ch.* 21. 1678, *ch.* 18.

Carmichael on the same side, contended, that the right of a court of judicature to review a law, when the constitutional rights of a citizen had been thereby affected, had been solemnly established in *Maryland*, and being admitted by the counsel for the appellant, it became unnecessary to refer to authorities to sustain the principle. In the sound and judicious exercise of this power the people found security.

In questions of this nature it was necessary to refer to the country from which are derived the principles of our jurisprudence. Claims for alimony were there cognizable in the spiritual courts, and under certain circumstances in the Court of Chancery of *England* obtained a hearing.

The rules and principles by which the decision of cases of this nature were there regulated, might be found by reference to 1*st Chitty's Black.* 441. 3 *Ib.* 94. *Watkyns vs. Watkyns*, 2 *Atk.* 97. 1 *Fonb. Eq.* 94, *note* 104. *Duncan vs. Duncan*, 19, *Ves. Jr.* 396, 397.

From the researches of counsel it did not appear in what court under the colonial government, the claims for alimony were considered. That such causes were not heard and adjudicated, by the Commissary General or his deputies, might be inferred from the silence of *Valletto* in his Deputy Commissary's Guide.

Whether they were in the Court of Chancery was a question to which no evidence could be readily furnished. The only case that had been decided in the *Province* is to be found in *Galmith vs. Galmith*, 4 *Harr. & M'H.* 477, in that case the County Court of *Calvert* had heard and given judgment upon a claim for alimony, which judgment was reversed by the Provincial Court.

By the declaration of Independence in 1776, *Maryland* became a sovereign, independent state with general powers; the limitations to the exercise of which existed only in the constitution and bill of rights. At this period it could not be denied, that the claim for alimony was within the jurisdiction of the legislature.

There was no other tribunal, before which it could be presented. No such authority had then been imparted to the judicial tribunals, or to the executive of the State. But in the next year, the cognizance of claims for alimony was given to the Court of Chancery. This will be found in the 14 *sec.* of the 12 *ch.* of the *Act of* 1777.

The right of the wife to alimony did not arise necessarily on separation from the husband. If under the influence of a perverse and evil temper she absconds, or if she elope with an adulterer, she can sustain no claim for alimony. But wherever it is claimed, enquiries as to conduct of this nature, may be instituted; and in 1777 the legislature feeling that such investigations, comported not with the nature of the functions they were intended to discharge, and that justice to the parties could not be rendered, invested the Chancellor with authority to hear and decide all questions of this nature. *Meginnis* as a free citizen of *Maryland* could not be deprived of his property, but by the judgment of his peers, or the law of the land. This was a security extended by the bill of rights to him, in common with the other citizens of the State. Before a claim of alimony could be established against him, he was entitled to a hearing of all the circumstances of the case, in the Court of Chancery. This was secured to him by the act of 1777, *ch.* 12, *sec.* 14. This was the law of the land, and any act of the legislature depriving him of this right was a direct violation of those first principles upon which the government is based. It operated by robbing him of the protection of the law of the land; such is the *act* of 1823, *ch.* 93. By this act the legislature clothed themselves with powers vested in the Chancellor by the act of 1777, and undertook to dispose of private rights which could be affected by them, only by a violation of the constitutional rights of a citizen.

Among other evils that were felt under the colonial government, were those which arose from the exercise by the *English* colonial governors of all the functions of government, executive, legislative and judicial. The bill of rights regarding the abuses necessarily incident to the concentration of these powers, declared that the legislative, judicial and executive powers, shall be kept for ever separate and distinct. In pursuance of this principle the act of 1777 was passed. Whether a modern legislature have the constitutional right to repeal this law, and clothe themselves with power to hear and adjudicate cases of alimony is not the matter to be decided; but it is whether this law being unrepealed, and in force, the legislature of 1823 had the right, to subtract this particular cause from the legal tribunals of the State, make the courts of a law a registry for their decisions, and impose upon them, the task of giving efficacy to a law, without the power of enquiring into its justice or legality.

Chambers in reply. The sixth article in the bill of rights, like the other declaratory articles in the same instrument, was intended to assert a general principle. No government ever did, or ever can exist, in which a precise verbal and literal execution of that article and others will be found. Those who framed, and those who enforced our admirable principles of government, so considered them. The 47th number of the *Federalist*, from the pen of *Mr. Madison*, shews this fully.

It would be an endless task to cite to the court, the numberless instances in which the principle, if taken in the latitude now claimed has been impugned. In the very first session after the bill of rights was framed, and when no doubt the very men who adopted it were members of the legislature, we find laws to *revive proceedings in court,—to revive and aid proceedings in court,—to direct the recording of a deed. In the next year*, 1778, *laws were made to empower persons to sell land,—to authorize a deed to be recorded,—to enable a widow and executrix to sell her testator's land. In* 1779, *to revive and aid proceedings in Talbot Court,—to revive and continue actions and process in Worcester Court,—same in Caroline Court,—to enlarge the powers of an executrix, and to record deeds, and to take depositions.* These are acts partaking of a judicial character, some in a greater degree, others less, but all more than the case at bar. In most of these cases, there was a plain and ample existing remedy through the judicial tribunals; here there was no power but the legislature who could administer remedy for the principal evil, and in this exercise of exclusive power over the principal subject, they have legislated also for the accessory. The same system of legislating, has been continued from our primeval history to this period, and the labor or the learning of the adverse counsel have not produced the evidences of the want of constitutional obligation in these laws. This case of *Steuart vs. Laird*, would seem to make them a contrary evidence of themselves, being a cotemporaneous construction. The sole object of these declaratory principles, is to prevent the usurpation by one branch of the government, of such power and jurisdiction belonging to another branch, as would consolidate the one and annihilate the other, at least to an extent which would encourage the use of arbitrary power.

If this was a case of alimony, distinctly and exclusively, there would be reason for the objection urged. It is conceded, that the subject of alimony, is one of *judicial* cognizance, according to the laws of *Maryland*. But alimony is not recoverable in a case of separation without divorce.

The twenty-first article of the bill of rights is subject to the same limitation, as before applied to the sixth. Such a case as the present, is not in its contemplation. Private property is taken for public service in seasons of war, for roads, canals, and other great exigencies, and taken against the will of its owner, and without any supposed violation of this article in the bill of rights. So private property, and private rights, must yield to the more imperative claims of public interest, and the proper police of the State. The marital rights acquired by the contract, are as solemnly secured, and as distinctly defined, and as important in their character, as the rights of real or personal property, and yet these are affected and destroyed, when their longer possession by the individual, conflicts with the great principles which regard the morals and well-being of society: and when affected, they require of necessity the incidental operation of the law upon the pecuniary rights of the parties. But in this case it is contended, the law of the land and the judgment of peers, are the instruments by which the party's property is to be taken away. The act of Assembly is the law of the land, and the trial by a jury is secured to him.

There is no evidence in this case, that the act passed without the consent of the husband, and to reject any presumption necessary to sustain the act of the legislature, would be in disobedience to the courtesy and respect, which are due from one branch of the government to the other, according to the principles of both political and municipal law.

If this power does not reside in the legislature, it exists nowhere. The laws of *Maryland* have not conferred on any judicial tribunal, the power to divorce or separate husband and wife. The legislature alone, is competent to exercise jurisdiction on the subject, and being in possession of jurisdiction of the principal matter, can rightfully do whatever the peculiar circumstances of a case may demand, and it is a most delicate office in an inferior or co-ordinate department of the government, to assume, that it has acted unadvisedly and without competent information of the facts, or to pronounce its enactment, in violation of the constitution or bill of rights.

Earle, J. at this term delivered the opinion of the Court.

A constitutional question is involved in the consideration of this case, and before we enter upon the solution of it, we will state some positions preliminary to the subject.

The constitution of this State, composed of the declaration of rights and form of government, is the immediate work of the people, in their sovereign capacity, and contains standing evidences of their permanent will. It portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise, and specifying that from the exercise of which it must abstain. The public functionaries move then in a subordinate character, and must conform to the fundamental laws or prescripts of the creating power. When they transcend defined limits, their acts are unauthorised, and being without warrant, are necessarily to be viewed as nullities. If considered as valid acts, the distinction between unlimited and circumscribed authority is done away, the derivative exerts original power, and of constitutional law nothing is left but the name.

The legislative department is nearest to the source of power, and is manifestly the predominant branch of the government. Its authority is extensive and complex, and being less susceptible on that account of limitation, is more liable to be exceeded in practice. Its acts, out of the limit of authority, assuming the garb of law, will be pronounced nullities by the courts of justice; it being their province to decide upon the law arising in questions judicially before them, and upon the constitution as the paramount law; but this is more in fulfilment of their own duty, than to restrain the excesses of a co-ordinate department of the government. The check to legislative encroachments is to be found in the declaration, that the legislative, executive, and judicial powers ought to be kept separate and distinct; and in the solemn obligations of fidelity to the constitution, under which all legislative functions are performed.

With these general views of constitutional law, we proceed to consider the questions more immediately before the court. On the argument of the cause, the courts attention was directed to act of Assembly passed in 1823, entitled, "An act for the relief of *Mary Meginnis*," which the appellee's counsel asserted to be in violation, in some of its provisions, of the constitution of the State. Should it be found to be so, the judgment of *Kent* County Court will be affirmed, the appeal having been taken in a suit founded wholly upon this act of Assembly. Whether the act is then an infringement of the constitution, is the main question to be determined by this court, and it rests upon the two following points: Is the enactment of the third section of the act of 1823, an exercise by the legislature of judicial power? Is the exercise by the legislature of judicial power, in the passage of a law, repugnant to the constitution?

The act of 1823 is an act of divorce, separating *Mary Meginnis* from the bed and board of her husband, and its third section is clothed in this language: "And be it enacted, that the said *Casparus Meginnis* shall annually hereafter pay to *John Crane* of *Queen Ann's* County, who is hereby made the trustee in that behalf, to and for the use and benefit of the said *Mary Meginnis*, the sum of three hundred dollars, in two equal instalments, the first on the first day of March, and the second on the first day of September, in each and every year during the joint lives of the said *Casparus Meginnis* and *Mary Meginnis*, and the said trustee shall be authorised to institute suit in his own name for any instalment which shall not be paid, on the day on which the same is hereby declared to be due, and it shall be the duty of the court before whom the suit is brought to try the same at the term to which the writ is made returnable." This grant of an annuity, is called a grant of alimony, and it is contended, that after the legislative separation, it might have been recovered by the wife in the Court of Chancery, pursuant to the laws of this State, if her case merited the interference of the Chancellor, and the circumstances of the husband justified the allowance of such a sum.

The investigation of this point led us into a general review of the *British* law of divorce and alimony. From the research it has appeared to us, that they are both of judicial cognizance in the Ecclesiastical Courts of that country; that the divorce *a mensa et thoro* separates the parties for unfitness for the marriage state, and the separation is the remedy administered for the injury to the suffering party; that alimony is the maintenance afforded to the separated wife for the injury done her by her husband, in neglecting or refusing to make her an allowance suitable to their station in life, and is treated as a consequence drawn from the divorce *a mensa et thoro;* and that each of those matrimonial causes is dependent on different facts, and is redressed by different judgments, although both are within the jurisdiction of the same tribunal. In this State the act of divorcing man and wife has been performed by the legislature, for the want perhaps of ecclesiastical authority to effect it, or borrowing perchance the power from the parliament of *Great Britain*, which sometimes granted divorces *a vinculo matrimonii*, for supervenient causes, arising *ex post facto*, a thing that the spiritual courts could not do. However this may be, divorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light, than as regular exertions of legislative power. The private acts passed for more that ten years back we have adverted to, and almost every divorce law has been found to be expressed in terms peculiar to itself. In some, the mere separation from bed and board is effected in the plainest and shortest way, as in the case of *Francis B. Mitchell* by the act of 1822, *ch.* 138, and in the case of *Sarah Kerr* by the act of 1824, *ch.* 118; and in other acts, separating the married parties, particular consequences of a continuing coverture are sedulously guarded against. In none, not even in the act of 1818, *ch.* 203, referred to by counsel, is there any thing like a provision for the future maintenance of the wife, graduated to the circumstances of the husband, and the station in life of the parties, as the act of 1823 would appear to be. On the other hand, the suit for alimony in this State, as in *Great Britain*, is a distinct remedy from the proceedings to obtain a divorce, and for a series of years the wifes' maintenance has been recoverable through the intervention of our judicial tribunals. So early as the year 1689, in the case of *Galwith vs. Galwith*, 4 *Harr. & M'Hen.* 477, it was asserted in the Supreme Court of the Province, that alimony is only recoverable in Chancery, or the Court of the Ordinary; and in the year 1777, the act of Assembly was passed, which expressly authorised the Chancellor to hear and determine all causes for alimony, in as full and ample manner as such causes could be heard and determined by the laws of *England* in the Ecclesiastical Courts there. Since this last period, such causes have been continually acted upon by the Chancellor, and in some instances appeals have been taken to the Appellate Courts, and decided on by them. And we cannot permit ourselves for a moment to doubt, that if *Mary Meginnis*, like *Francis B. Mitchell* and *Sarah Kerr*, had obtained simply an act of divorce, she might have recovered, having merits, a maintenance suitable to her station in life, and to quadrate with the situation of her husband, by a bill in Chancery, or an application to the equity side of *Kent* County Court. If she could have been thus redressed by an exercise of judicial authority, we would ask, is it not fair to conclude that the redress granted to her by the legislature, is an exercise of judicial authority? The nature of the power employed must be judged of, by having an eye to the like power exercised by a co-ordinate department. Should the executive try and sentence a felon to punishment, the judicial authority exercised could not be mistaken: and should the judiciary undertake to enact and promulgate a law, and exact obedience to it, the act would doubtlessly be pronounced, at once, an usurpation upon the functions of the legislature.

The enactment of the third section of the act of 1823, being in our opinion an exercise by the legislature of judicial power, our attention will now be engaged for a short time with the enquiry, whether the exercise by the legislature of judicial power in the passage of a law, is repugnant to the constitution.

The decision of this point must depend upon the sound construction of the *sixth section* of the bill of rights, which says, "that the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other." This political maxim made its appearance, in some form, in all the state constitutions formed about the time of the war of the revolution, and is said to have been borrowed by them of the celebrated *Montesquieu's Spirit of Laws*, vol. I. p. 181. In whatever terms they have adopted it, in none of these constitutions are the several departments kept *wholly* separate and unmixed. In some of them, as in the constitution of this State, the executive is appointed by the legislature, and the judiciary by the executive, and in others, the powers of the several departments are still more blended and mingled together. Upon a full consideration of each of them, it seems to us to have been the intention to ingraft this invaluable maxim of political science on their respective systems, only as far as comported with free government, and to prohibit the exercise by one department of the powers of another department, or to confine each department to the exclusive exercise of its own powers. This last is admirably expressed in the constitution of *Massachusetts*, and evinces a perfect acquaintance of its framers with the pages and doctrines of Baron *Montesquieu.* It is worded thus: "That the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them." The inhibition goes to the *practical* exercise of powers conferred by the constitution, and to be used after it is in operation, and does not apply singly to the original distribution of powers among the departments of the government. In the same sense we construe the *sixth* article of our bill of rights, which has the same objects in view with the constitution of *Massachusetts*, although somewhat different terms are employed to express them. The one imitates the language, and the other dives into and ex presses the meaning of the venerated author from which they both copied. Their common purpose is to confine in practice, the action of each department to its own appropriate sphere, by forbidding to it the use of powers allotted to the co-ordinate departments.

We have already determined the first point, and we have now to add our perfect conviction, that the exercise by the legislature of judicial power in the passage of a law, is repugnant to the constitution. Our conclusion from all this reasoning is, that the *third section* of the act of 1823 is a nullity, and was rightly considered unavailable to support the plaintiffs action in the County Court where the suit originated, and that the judgment therefore ought to be affirmed.

In acting upon this case, we wish to be understood to decide nothing but the points before mentioned—only to adjudge that the exercise by the legislature of judicial power, is in opposition to the constitution, and that the enactment of the *third* section of the act of 1823, was an exertion of judicial power, and is necessarily a void act.

JUDGMENT AFFIRMED.

CHAPPELLEARS EX'RS *vs.* HARRISON.—*December*, 1829.

In replevin the defendants avowed for rent in arrear due to them as Executors of C, from the plaintiff as tenant to their testator, for the term of two years ending on the 31st December, 1820; and averred that the plaintiff still remained in possession of the rented premises. The plaintiff pleaded 1st, that he did not possess and enjoy the premises under a demise from C. as his tenant, in manner, &c. 2d. That C did not demise the premises to him in manner, &c. 3d. No rent in arrear. Upon these pleas issues were joined, and on their trial in addition to proof of the avowry, it appeared that C died in *March*, 1820—that on the 1st January, 1821, the avowants rented the same premises to the plaintiff for the year 1821, and as executors of C made their distress for the rent of 1819-20—nineteen months after the termination of C's lease, and while the plaintiff was in possession under the demise of the avowants. The County Court instructed the jury, that the distress not having been made within six months next after the termination of the demise by C, and the avowants having before the time of making their distress, made a new lease to the plaintiff, they must find a verdict for him. *It was held upon appeal,* that no question as to the right of the avowants as executors of C, to make a distress for rent falling due under a demise by him, either before or after his death arose upon this record; that whether the distress was made in due time or not, was not in issue by the pleadings, and that the instruction of the County Court was erroneous.

Appeal from *Saint Mary's* County Court.

This was an action of *replevin* brought by the appellee (the plaintiff in the court below) against the appellants (the defendants in that court.)

This case which is fully stated by the Judge who delivered the opinion of the court, was argued before, **Buchanan**, Ch. J. **Earle** and **Dorsey**, J.

A. C. Magruder and *Causin*, for the appellants contended.

1. That no issue in the cause would have justified the court, in giving the instruction for the first reason, even if such had been the law, had the proper plea been pleaded.

2. That it was not necessary that the distress should have been made at an earlier period.

3. That the reduction of the rent, the following year could not take away the remedy by distress for the rent in arrear. *They cited Beavan vs. Delahay & Lewis*, 1 *H. Blk.* 6, *Ib.* 7, (*note*)

No counsel argued for the appellee.

Buchanan, Ch. J. delivered the opinion of the Court.

It appears from the pleadings in this cause, that the appellants avowed for five hundred dollars rent in arrear, due and owing to them as executors of *John Chappellear*, by the appellee as tenant to their testator, of a dwelling house which he held and enjoyed under him, for the term of two years ending on the thirty-first of December, 1820, by virtue of a demise at the yearly rent of $250; and set out in the avowry that the appellee still remained in possession of the premises. To this it was pleaded, 1st. That the appellee did not possess and enjoy the premises

&c. under and by virtue of a demise from *John Chappellear* as his tenant, in manner, &c. 2d. That *John Chappellear* did not demise the premises, &c. to the appellee in manner, &c. and 3d, That the sum of five hundred dollars was not in arrear and unpaid to *John Chappellear*, nor any part thereof at the time when, &c. upon which issues were joined.

A witness examined on the part of the avowants, who are the appellants here, proved the demise set forth in the avowry, by *John Chappellear* their testator, to the appellee at the yearly rent of $250: that the appellee entered upon the premises so demised as tenant to *John Chappellear*, and occupied and enjoyed the same, for and during the years 1819 and 1820, atthe stipulated annual rent of $250, and that the appellee continued in the occupation thereof until the first of January, 1824. If the testimony had stopped here, we should probably not have heard of this case. But the same witness proceeded to prove, that *John Chappellear* died in the month of *March*, 1820, that the appellants on the first of January, 1821, rented the same premises to the appellee for the year 1821 for the sum of $90, and that the appellants as executors of *John Chappellear*, made their distress for the rent due and in arrear from the appellee for the years 1819 and 1820, under the demise by *John Chappellear*, on the 1st of August, 1822, nineteen months after the termination of the lease by *Chappellear* to the appellee, and when the appellee was in possession of the premises under and in virtue of a letting by the appellants. Upon this evidence, the court before which the cause was tried, was of opinion and so instructed the jury (as we understand the opinion and instruction set out in the bill of exception) that the distress not having been made, within six months next after the termination of the demise by *John Chappellear*, and the appellants having before the time of making the distress, made a new lease of the premises to the appellee, they must find a verdict for the appellee, in which opinion and instruction we do not concur. No question as to the right of the appellants as executors of *John Chappellear* to make a distress for rent falling due under a demise by him, either before or after his death, arises upon this record. It does not appear whether *Chappellear* himself had more than a term in the premises; and whether the distress was made in due time or not, is a question that is not raised by the pleadings in the cause. If the appellee was desirous of making that question, he might, and ought to have raised it, by putting in a proper plea for that purpose. He might have pleaded that the distress was made after the expiration of six months, next after the termination of the demise by *Chappellear*, and thus have put that matter in issue. He did not so plead, and there was no issue joined, to which evidence of that fact was applicable, or to entitle the appellee to a verdict on that ground. The only questions presented to the jury by the issues appearing in the record, were 1st. Whether the appellee did possess and enjoy the premises in which, &c. under a demise from *John Chappellear* as his tenant. 2d. Whether *John Chappellear* did demise the premises, &c. to the appellee. And 3d. Whether the sum of $500 or any part thereof was due and unpaid as rent in arrear to *John Chappellear*—And the proof as stated in the bill of exception, appearing to be full in support of the issue joined on the part of the appellants, we perceive nothing to authorise the direction given to the jury to find a verdict for the appellee upon the issues joined in the cause, and which alone they were sworn to try.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

THE MAYOR & CITY COUNCIL OF BALTIMORE *vs.* HUGHES'S Adm'r *D. B. N.*—*December*, 1829.

Under the 2d. sec. of the act of 1797, *ch.* 54, the power given to the *Mayor and City Council of Baltimore*, "to tax any particular part or district of the city, for paving the streets, lanes or alleys therein, or for sinking wells or erecting pumps, which may appear for the benefit of such particular part or district," is not confined to any particular description of benefit—such as the ordinary benefit and advantage of paved streets. The preservation of the health of such particular part of the city, is a benefit within the meaning and scope of the act.

The legality of laying such tax, does not depend upon whether the paving does, or does not in fact, benefit the particular district taxed, but upon the object, the motive of the corporation in causing the paving to be done.

In an ordinance providing for such paving, and the imposition of such a special tax, it is not necessary that it should be expressly stated to be for the benefit of the particular district; if nothing appears to the contrary, such an exercise of the special taxing power will be taken to have been in pursuance of the authority given by the charter.

But where an ordinance provides for the paving of a street, &c. in a particular district, and the imposition of a special tax for that purpose on such district, which paving *appears from the ordinance* to be for the general benefit of the city, and not for the benefit of the particular district, it is not in pursuance of the authority conferred by the charter, and is void.

So upon the construction of the 13*th sec.* of the ordinance of the 9*th March*, 1807, which declares "that if the *Commissioners of Health* shall, at any time report in writing to the *City Commissioners*, that a nuisance exists in any street, lane, or alley in the city of *Baltimore*, which will endanger the health thereof," &c. it was held that the word *thereof* does not relate to the city of *Baltimore*, so as to make it mean a nuisance which will endanger the city, but that it relates to any street, lane or alley, &c. and means a nuisance that will endanger the health of such street, &c. and the ordinance is clearly within the power conferred by the charter.

A corporation must act within the limits of its delegated authority, and cannot go beyond it, yet it ought not by construction to be made to mean what is not clearly expressed, but when its ordinances will admit of two constructions, they should receive that which is consistent with the power given, and not that which is in violation of it.

Where one board of commissioners, in the execution of their duties, were required to report in writing to another board of commissioners, who thereupon were to do certain acts; and these boards were subsequently united without any change being prescribed as to the mode of discharging the trusts formerly confided to each of them, the formality of a written report as above directed, was necessarily dispensed with.

Under the 13th section of the ordinance of the 9th March, 1807, the City Commissioners and Commissioners of Health, were required to form a positive and decided opinion that "a nuisance exists" in some "street, lane, or alley in the city of *Baltimore*, which will endanger the health thereof"—An entry in their books of their decision is not required. Certificates in their warrants, which they are directed to issue for the collection of the tax imposed to remove the nuisance, of the existence of the nuisances and of their characters would be sufficient; but where they say in each warrant that they conceive the street mentioned, to be in a state of nuisance, which might endanger the health of the city, thus referring to the health of the city generally, not to that of a particular part, it is not such an opinion as the ordinance requires, and the tax imposed under it cannot be enforced.

It is not competent to prove by oral testimony, the existence of facts to be ascertained by public commissioners, preparatory to laying a tax, which such commissioners are required to certify in writing.

The action for money paid, laid out, and expended, must be founded upon a contract, express or implied.

No person can, by a voluntary payment of the debt of another, without his authority, make himself a creditor of the person whose debt is thus paid.

If one is compelled, or is in a situation to be compelled to pay the debt of another, as in the case of a surety and does pay it, the law implies a promise on the part of him for whom the money is paid, on which an action may be sustained, for in such case it is not a voluntary, but a compulsory payment.

A tax imposed by a municipal corporation cannot be recovered on a count for money paid, laid out, and expended, although such corporation has paid the cost of the improvement for which the tax was created.

Nor can the cost of such improvement, or any part thereof, be recovered from a defendant, liable to pay tax therefor on a count for work and labor, where the ordinance under which the work was done, has not been properly pursued, so as to create a legal liability in the defendant.

Appeal from *Harford* County Court. This was an action of *Assumpsit*, originally brought in *Baltimore* County Court, but on suggestion, &c. of the defendant (the intestate of the appellee) was removed to *Harford* County Court. After the cause was so removed, the death of the original defendant was suggested, and the present appellee was made defendant, as his administrator *de bonis non.* The action was brought to recover the sum of $1880 35, alleged to be due to the plaintiffs (the appellants) for certain paving taxes assessed upon the property of the intestate, by virtue of the corporate powers vested in the plaintiffs by certain acts of Assembly. The declaration contained *six* counts—four special counts, and two general counts. The *first* count was for a paving tax, on application, &c. imposed the 24th of April, 1809, on *Forrest street*, &c. amounting to $656. The *second* count was for a paving tax *to remove a nuisance*, imposed the 20th of July, 1812, on *Barre street*, between *Light* and *Charles streets*, amounting to $728.28. The *third* count was for a similar tax, imposed the 29th of July, 1812, on *Forrest street*, between *Lee* and *York streets*, amounting to $496 07.

The *fourth* count was for paving taxes generally, amounting to $1880 35, being the aggregate of the sums mentioned in the three first counts of the declaration. The *fifth* count was for money paid, laid out and expended; and the *sixth* count was for work and labor. The defendant pleaded *non assumpsit*, and issue was joined.

1. At the trial the plaintiffs gave in evidence an act of the General Assembly of this State, passed at November session, 1796, entitled, "an act to erect *Baltimore town*, in *Baltimore* County, into a city, and to incorporate the inhabitants thereof." (1796, *ch.* 68.) And also another act of the said General Assembly, passed at November session, 1797, entitled, "A supplement to the act, entitled, An act to erect *Baltimore town*, in *Baltimore* county, into a city, and to incorporate the inhabitants thereof." (1797, *ch.* 54.) They further gave in evidence an ordinance of the Mayor and City Council of *Baltimore*, entitled, "An ordinance to appoint city commissioners, and prescribing their duties," approved March the 9th, 1807. And also gave in evidence another ordinance, entitled, "An ordinance to unite the powers and duties of the city commissioners and commissioners of health," approved 22d day of March, 1807. They also gave in evidence, that during the year 1809, *Henry Stouffer*, *John Bankson*, *William C. Gouldsmith*, and *Samuel A. Gatchell*, were city commissioners, duly appointed and qualified, and that the said *John Bankson*, *William C. Gouldsmith*, and *Samuel H. Gatchell*, have been dead several years; and also gave in evidence, that *Edward Johnson* was in said year, the Mayor of the city of *Baltimore*, duly elected and qualified. That on the 13th of June, 1808, the following petition was presented to, and received by the said *Henry Stouffer*, *&c.* commissioners as aforesaid.

"The City Commissioners, Gentlemen—The subscribers, owners and occupiers of houses and lots situate on *Forrest street*, between the southernmost boundary line of the city and *York street*, are desirous to have the same paved as soon as possible." Signed by a number of petitioners, and among others the original defendant *Hughes*.

On the back of which said petition was thus endorsed: "No 1. Petition for paving *Forrest street.* Rec'd. 13th June, 1808. Ordered to be surveyed." They further gave in evidence the following entries made in the book containing the proceedings of the said commissioners, viz. *Baltimore*, 8 May, 1809. Commissioners met. Present, full board. Issued warrant for the paving of *Forrest street*, $1584 87, $1503 57, $3088 44." They further gave parol evidence, that upon said application the said commissioners decided to pave said street, and obtained the verbal assent of the mayor of said city to such pavement; they also offered parol evidence, that the signers of said application or petition, constituted a majority of the proprietors and tenants inhabiting on said street, between the limits so required to be paved; and that *Christopher Hughes*, one of the proprietors, was the same *Christopher Hughes* who signed said application or petition; and also gave in evidence the following warrants: "City of *Baltimore*, *sct.* The city commissioners having been requested by a majority of the proprietors of lots bounding on *Forrest*, between *York street* and the outlines of the city, and tenants inhabiting thereon, by their written application of the fifteenth day of June last, and having determined on the propriety of paving said street front of said lots, agreeably to their request, did cause to be made the following list of the names of the persons who are liable to pay the tax by law directed to be levied for paving the said street, it being the width of eighty two feet six inches." Here follows the names of sundry persons, and amongst others, *Christopher Hughes*, $656.

"City of *Baltimore*, to wit: By virtue of an ordinance, entitled, An ordinance directing the manner of collecting and appropriating the money levied for paving the streets, lanes and alleys, in the city of *Baltimore*, and also an ordinance, entitled, An ordinance for more equal assessing and levying the paving tax on the streets, lanes and alleys, in the city of *Baltimore*, we the subscribers, city commissioners, do hereby authorise and direct you to collect from the several persons whose names are hereto above annexed, the several sums of money opposite their respective names, being the street tax on *Forrest street*, between

York street and the outlines of the city. That you will make collection aforesaid, and pay the same to the register of the city, agreeably to the directions of the ordinance aforesaid, and this shall be your sufficient warrant therefor. Given under our hands and seals this 24th day of April one thousand eight hundred and nine." Signed and sealed by *Henry Stouffer, &c.* the city commissioners. "8th May, 1809. Approved *Edward Johnson.* To the Collector of the City of *Baltimore, Benjn. Fowler*, Esquire." On the back of which said warrant was thus endorsed: "Warrant for paving *Forrest street*, dated 8th May, 1809. Entered." They also gave in evidence that the said street then was, and still is, a public street in said city, and that the city commissioners caused that part of the said street called *Forrest street*, between *York street*, and the outlines of the city, to be paved, and that the proportion of the paving tax of the said *Christopher Hughes* for paving said part, amounted to $656, and that he paid on account thereof, when the paving was done, the sum of $500. They then offered in evidence that *Henry Stouffer, &c.* were city commissioners, and commissioners of health, in the city aforesaid, in the year 1812, duly appointed and qualified as such; that *Edward Johnson* was then and during the said year, the mayor of said city, duly elected and qualified as such. The plaintiffs then gave in evidence the following entries made upon the books of the commissioners aforesaid, viz. "*Baltimore*, 29th June, 1812. Commissioners met. Present, full board. *Barre*, between *Light* and *Charles streets*, and *Forrest*, between *Lee* and *York streets*, declared by the board of health to be in a state of nuisance, which cannot be removed without paving the same. Resolved, that the same be forthwith paved." And that the books in which said entries are found and taken from, are the books, and only books, of the commissioners of health and city commissioners, in which all their proceedings are entered. The plaintiffs further gave in evidence the following warrants: "City of *Baltimore*, sct. We the city commissioners, as also commissioners of health, conceiving *Barre street*, between *Charles* and *Light streets*, to be in a state of nuisance, which might endanger the health of the city, and which nuisance in our opinion cannot be removed but by paving, do adjudge and determine that the same be paved front of the lots bounding thereon, have caused to be made the following list of the names of the persons who are liable to pay the tax by law directed to be levied for paving said street front of said lots." In that list is the name of *Christopher Hughes*, $728. 28.

"City of *Baltimore*, sct. By virtue of an ordinance, entitled, An ordinance directing the manner of collecting and appropriating the money levied for paving the streets, lanes and alleys, in the city of *Baltimore*, as also an ordinance, entitled, An ordinance for the more equal assessing and levying the paving tax on the streets, lanes and alleys, in the city of *Baltimore*, and agreeably to an ordinance respecting nuisances, we, the city commissioners, do hereby authorise and direct you to collect from the several persons whose names are hereto above annexed, the several sums of money opposite their respective names, being the paving tax on *Barre street*, between *Charles* and *Light streets*. That you will make the collection aforesaid, and pay the same to the register of the city, agreeably to the ordinances aforesaid, and this shall be your sufficient warrant therefor. Given under our hands and seals this twentieth day of July, 1812." Signed and sealed by *Henry Stouffer*, &c. the city commissioners, "23d July, 1812. Approved *Edward Johnson*, Mayor." To the collector City of *Baltimore*. On the back of which said warrant was thus endorsed—"Warrant for paving *Barre street* between *Charles* and *Light streets*. Dated 23d July, 1812. Ent."

"City of *Baltimore*, sct. We the city commissioners, as also commissioners of health, conceiving *Forrest street*, between *Lee* and *York streets*, to be in a state of nuisance, which might endanger the health of the city, and which nuisance, in our opinion, cannot be removed but by paving, do adjudge and determine, that the same be paved front of the lots bounding thereon, and have caused to be made the following list of the names of the persons who are liable to pay the tax by law directed to be levied for paving said street." In that list *Christopher Hughes'* tax was $496 07. A similar warrant to that last mentioned was issued on the 29th of July, 1812, by the commissioners for collecting the tax, and which was approved by the mayor on the same day. On the back of which said warrant was thus endorsed—"Warrant for paving *Forrest street*, between *Lee* and *York streets.* Dated 29th July, 1812. Ent'd." The plaintiffs also gave in evidence, that *Barre street*, between *Charles* and *Light streets*, and *Forrest street* between *Lee* and *York streets*, then were, and still are, public streets in the said city of *Baltimore*, and that said *Christopher Hughes* was in possession, and claimed title to the property on *Barre* and *Forrest streets*, for about thirty years, at the time the said streets were paved, and that the city commissioners aforesaid, caused that part of *Barre street*, between *Charles* and *Light streets*, to be paved, and that the said proportion of the said paving tax therefor of the said *Christopher Hughes*, amounted to $728 28, as assessed to him by the city commissioners; and that the said commissioners caused that part of *Forrest street*, between *Lee* and *York streets*, to be paved, and that the proportion of the said paving tax, as charged by the city commissioners to the said *Christopher Hughes*, amounted to $496 07. The plaintiffs further offered in evidence, by *Elisha T. Bailey*, that he contracted with the said commissioners to pave the said parts of the said two streets last mentioned; that he did pave the same, and received payment therefor from the plaintiffs, and that the said *Christopher Hughes* was frequently present on the said parts of streets, when the witness was so paving the same, and requested a part thereof to be done in a particular manner, by objecting to certain stones used as improper, and requesting him to put in others, which the witness accordingly did: that the first part of said work was commenced in July, 1812, and finished either the last of July or first of August. Whereupon he immediately commenced the paving the other street, and finished the same in the fall of the year; that the said *Christopher Hughes*, when the said paving was finished, offered to pay the said *Bailey* for paving on said streets, so performed by him, provided he would take unimproved lots in payment therefor, which the said *Bailey* refused to do. The plaintiffs further gave in evidence that the said *Henry Stouffer*, &c. mentioned as the city commissioners, are the same persons who composed the board of health of the said city, and were commissioners of health at the periods and in the year before mentioned; and they further gave evidence, that the several warrants herein before mentioned, were duly approved by the mayor of the city of *Baltimore*, before the same were issued and delivered to the collector of said city.

The defendant then, prayed the court to instruct the jury, that the plaintiffs were not entitled to recover for the paving of *Barre street*, between *Light* and *Charles streets*, and *Forrest* between *Lee* and *York streets*—1st. Because there is no evidence that the commissioners of health, or board of health, did at any time ascertain that a nuisance existed in the said streets, which would endanger the health of the city of *Baltimore;* and also because there is no evidence that the said commissioners of health, or board of health, did at any time report in writing to the city commissioners, that a nuisance existed in the said streets, which will or would endanger the health of the city of *Baltimore.* 2d. And because the plaintiffs, by virtue of the *thirteenth* section of their ordinance of the 9th of March, 1807, entitled, "An ordinance to appoint city commissioners, and prescribing their duties," could not confer a power on the said city commissioners to assess or levy a tax on any particular part or district of the city of *Baltimore*, or the proprietors or owners of such part or district, for the purpose of preventing or removing a nuisance, which will endanger the health of the city of *Baltimore.* 3d. Because it is in evidence, and uncontradicted, by the books and proceedings of the commissioners of health, or board of health, and of the city commissioners, that *Barre street* between *Light* and *Charles streets*, and *Forrest street* between *Lee* and *York streets*, were declared by the board of health to be in a state of nuisance, and that the commissioners of health had not declared the said streets to be in a state of nuisance, which will or would endanger the health of the city. Which instruction the court [*Archer*, Ch. J.] gave to the Jury. The plaintiffs excepted.

2. The plaintiffs, in addition to the evidence set forth in the preceding bill of exceptions, offered in evidence by *Henry*

Stouffer, a witness sworn on the trial on the part of the plaintiffs, that he was the only survivor of the board of city commissioners, and commissioners of health, for the year 1812; and the plaintiffs further offered in evidence, by the said witness, that in the month of July, 1812, *Barre street* between *Light* and *Charles streets*, and *Forrest street*, between *Lee* and *York streets*, were entirely on made ground, and that a nuisance existed in the said part of the said streets, which endangered the health of the city of *Baltimore*, and that the same could not be effectually removed without paving the same. To the admissibility of which evidence, the defendant objected; and the court were of opinion, that the said testimony was inadmissible, and refused to let the same go to the jury. The plaintiffs excepted.

3. The plaintiffs further prayed the court to instruct the jury, that upon the evidence contained in the preceding bills of exceptions, the plaintiffs are entitled to recover in this action the proportion of the paving taxes chargeable to the said *Christopher Hughes* in his life-time, for the paving of *Barre street*, between *Light* and *Charles streets*, to wit, the sum of $728 28, and for the paving of *Forrest street*, between *Lee* and *York streets*, to wit, the sum of $496 07, under the *fifth* and *sixth* counts, in their declaration for money paid, laid out and expended, and for work and labor done, and materials found and provided; which instructions the court refused to give. The plaintiffs excepted; and the verdict for the plaintiffs being only for the sum of $318, and judgment thereon rendered, they appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN and STEPHEN, J.

Taney (Attorney General) and *J. Scott* for the appellants, contended that the court below erred in giving the instructions prayed for by the defendant, as set forth in the *first* bill of exceptions—1. Because the nature and character of the nuisances alleged to exist in *Barre street*, between *Light* and *Charles streets*, and in *Forrest street*, between *Lee* and *York streets*, were sufficiently ascertained by the proceedings of the board of health and city commissioners, according to the ordinance of the 9th of March, 1807, (*Young's Ed.* 60, *sec.* 13.)—the board of health and city commissioners being composed of the same persons. *Ib.* 165.

2. Because the powers and duties of the board of health and city commissioners, being united by the ordinance (*Ib.* 165,) that part of the 13th *section*, which requires a report in writing from the board of health to the city commissioners, of the existence and nature of the alleged nuisance must be considered as repealed—such a report being absurd and unnecessary.

3. Because the existence and character of the nuisance, being ascertained by the tribunal competent to decide the question, and the plaintiffs having the power to tax as well as pave, by the act of 1797, *ch.* 54, in the absence of proof to the contrary, it must be understood to be a lawful exercise of those powers.

4. Because the nature of the nuisance shows that it was for the benefit of those districts that it should be removed; and the competent authorities had decided, that it could only be done by paving.

5. Because the powers to prevent and remove nuisances, to pave, and to tax for the said paving, have been properly exercised by the plaintiffs by their officers and servants.

6. Because the nature and character of the alleged nuisances are sufficiently ascertained by the commissioners of health and city commissioners, in the warrants issued by them, and no other ascertainment thereof was necessary.

7. The appellants also contended, that the court below erred in refusing to grant the prayer of the plaintiffs, contained in the *third* bill of exceptions; because they offered evidence, proper to go to the jury under the *fifth* and *sixth* counts in the declaration, to show the assent of the defendants' intestate to the paving of *Barre street*, between *Charles* and *Light streets*, and of *Forrest street*, between *Lee* and *York streets*, and the payment for the same by the plaintiffs; and that upon such assent the plaintiffs were entitled to recover from the defendant for such paving, and for the money so paid, laid out and expended.

They referred to the acts of Assembly and ordinances stated in the bills of exceptions. Also to *The Mayor &c. vs. Moore & Johnson*, 6 *Harr. & Johns.* 380, and *the Mayor &c. vs. Howard*, *Ib.* 91.

R. Johnson for the appellee. 1. The character of the nuisance was not sufficient to justify the paving, under the ordinance of the 9th of March, 1807, *sec.* 13.—2. The paving was not such as authorised the imposition of the tax laid under the act of 1797, *ch.* 54. 3. The plaintiffs were not entitled to recover under the general counts in the declaration, for work and labor done, &c.

Buchanan, Ch. J. delivered the opinion of the court.

A recovery by the plaintiffs of the taxes imposed under the 13th *section* of the ordinance of the 9*th of March*, 1807, is resisted by the defendant on two grounds.

1st. That the power given by the ordinance has not been well executed.

2d. That the ordinance itself is not authorised by the charter.

The second ground relied upon involves the construction both of the charter and the ordinance, and will be first examined.

The *second* section of the act of 1797, *ch.* 54, a supplement to the act incorporating the city of *Baltimore*, gives to the corporation power to pass all ordinances, necessary for paving and keeping the streets, &c. in repair, "and to tax any particular part or district of the city for paving the streets, lanes or alleys therein, or for sinking wells, or erecting pumps, *which* may appear for the benefit of such particular part or district." In the case of *The Mayor and City Council of Baltimore, vs. Moore and Johnson*, 6 *Harr. & Johns.* 380, it was decided by this court, that the word *which* in that provision of the act, related as well to the paving the streets, lanes and alleys, as to the sinking of wells and erecting pumps, and that the corporation had authority to tax any particular part or district of the city, for paving the streets, lanes or alleys therein, which might appear for the benefit of such particular part or district. The reasoning by which that conclusion was arrived at, need not be repeated in this place. A different construction however would certainly be at war with the intention of the legislature, as it never could have been contemplated, to give to the corporation the power to tax any *particular* part or district of the city, for any paving which was for the *general* benefit, and not for the benefit of the *immediate* part or district taxed; which under a different construction, would be the effect of the second section of the act of 1797, taken altogether. Under this restricted construction, limiting the power of the corporation to tax any particular part or district of the city, for paving the streets, lanes and alleys therein, to a paving which shall be, or appear to be for the benefit of such particular district, and not for the general benefit of the city, which ought to be paid for out of the general fund, and not by the imposition of a special tax upon any particular part of the city, we think the corporation is not confined to any particular description of benefit, such as the ordinary benefit and advantage of paved streets; and that the preservation of the health of such particular part of the city, is a benefit within the meaning and scope of the act.

The legality of levying the tax, does not depend upon whether the paving does or does not in fact benefit the particular district that is taxed, but upon the object, the motive of the corporation in causing the paving to be done. And in an ordinance providing for such paving, and the imposition of such a special tax, it is not necessary that it should be expressly stated to be for the benefit of the particular district: but if nothing appears to the contrary, such an exercise of the special taxing power, will be taken to have been in pursuance of the authority given by the charter. It will be presumed that the corporation did not exceed its powers, but imposed the tax for the purpose only, for which the charter authorises it to be imposed, and that the paving appeared to the city council, to be for the benefit of the particular district.

But where an ordinance provides for the paving a street, &c. in a particular district, and the imposition of a special tax for that purpose on such district, which paving appears by the ordinance to be for the general benefit of the city, and not for the benefit of the particular district, such an ordinance is not in pursuance of the authority conferred by the charter, and is void. And such it is contended is the character of the 13th section of the ordinance of the 9th March, 1807, providing for the imposition of the taxes the recovery of which in this suit is resisted.

The provision of that section is in these words, "that if the commissioners of health, shall at any time report in writing to the city commissioners, that a nuisance exists in any street, lane or alley in the city of *Baltimore*, which will endanger the health thereof, and the city commissioners upon a full examination thereof, should be of the same opinion, and that the same cannot be effectually removed, without paving such street, lane or alley, they are hereby authorised and required, to proceed to the paving of such street, lane or alley, and to issue their warrant under their hands to the city collector, directing him to collect the tax which may be imposed for the paving the same, &c.

It is supposed that, it appears upon the face of this ordinance, that the nuisance here authorised to be removed by paving the street, &c. in which it may be found to exist, is such a nuisance only, as in the opinion of the commissioners of health and the city commissioners, will endanger the health of the *city* generally, and not of the particular district in which the paving is authorised to be done, and the tax to be imposed; and that the paving and taxing is intended for the general benefit of the *city* and not of the particular district. If such be the true construction of the ordinance, it cannot be questioned, that it was unauthorised by the charter, and that provision of it nugatory and void.

But to arrive at that conclusion, it must either be assumed, that a nuisance cannot exist in any particular part or district of the city of *Baltimore*, affecting or endangering the health of such particular part or district, without also so affecting or endangering the health of the whole city, or of the city generally, as to be a matter of such general concern, as that the means resorted to for removing it, can only be paid for out of the general fund, and not by a tax upon the particular district in which it may exist; and consequently that the paving contemplated and provided for by this ordinance, could only have appeared to be, and been intended for the general benefit of the city, and could not have been considered to be and intended for the benefit of the particular district to be paved, or that the language of the ordinance is such, as to show the object of the paving provided for, to be the general benefit of the city, and not the benefit of the immediate district.

With respect to the first of these positions, it by no means appears to us, that a nuisance cannot exist in a particular part or district of the city of *Baltimore*, affecting or endangering the health of such part or district, without also affecting or endangering the health of the city generally, and that no paving can be authorised for the removal of a nuisance endangering the health of a particular district, without having for its object the general benefit of the city, and not the benefit of the district in which the nuisance may exist. And if such a nuisance may exist, of which the corporation is competent to judge, it has authority, under the charter, to pass an ordinance for the removal of such a nuisance by paving, and to impose a local tax for that purpose, if it shall appear to be for the benefit of the particular district, in which the paving is authorised to be done. And if there be nothing expressed in this ordinance to the contrary, the presumption is, that the nuisance contemplated, is one endangering the health of the immediate district in which it exists, and that the sole object of the paving provided for, is the benefit of that particular district. Is there then any thing in the language of the ordinance to sustain the second position? Is there any expression pointing to the preservation of the general health of the city, or to the general, and not a local benefit, as the motive for authorising the paving provided for?

This case has been argued, as if the language of the ordinance was, "which will endanger the health of the city." But whatever might be the effect of such words if used, that is not the language of the ordinance; the commissioners in their warrants say that they conceive the streets directed to be paved, "to be in a state of nuisance, which might endanger the health of the city." And it is probable that, the language of the warrants and of the ordinance, may have been confounded by the counsel. The words of the ordinance are, "that if the commissioners of health shall at any time report in writing to the city commissioners that a nuisance exists in any street, lane or alley in the city of *Baltimore*, which will endanger the health thereof," &c. Not in terms the health of *the city*, but *thereof;* and the question is, whether the word *thereof* must he held to relate to the *city of Baltimore*, or may refer to the *street, lane or alley* in which a nuisance may be found to exist.

The power given by the charter under which this ordinance was passed, is, "to tax any particular part or district of the city, for paving the streets, lanes or alleys *therein*, or for sinking wells or erecting pumps which may appear for the benefit of such particular part or district." Now it has never been pretended, that the word *therein* in that clause related to the *city*, and meant for paving the streets, lanes or alleys, *in the city.* But it has always been considered, (and properly,) that it related to *the particular part or district* of the city to be taxed, and meant for paving the streets, lanes or alleys in such *particular part or district.* And the only question raised on that clause of the charter, in the *Mayor, &c. vs. Moore & Johnson* was, whether the latter part of it, "which may appear for the benefit of such particular part or district," related to the sinking of wells and erecting pumps, or extended also to the paving the streets, &c. So here we think that the word *thereof* in the ordinance, does not relate to the *city of Baltimore*, so as to make it mean a nuisance which will endanger the health of the *city of Baltimore:* But that it relates to *any street, lane or alley, &c.*, and means a nuisance that will endanger the health of such *street, &c.* The words *in the city of Baltimore* being only used as descriptive of where the street, &c. lies. And that there is nothing appearing upon the face of the ordinance, to show that the general benefit of the city, is the object of the paving provided for, and not the benefit of the particular district to be taxed.

This construction, brings the ordinance clearly within the power conferred by the charter, and although it is true, that a corporation must act within the limits of its delegated authority, and cannot go beyond it, yet it ought not by construction, to be made to mean what is not clearly expressed; but when an ordinance will admit of two constructions, it should receive, that which is consistent with the power given, and not that which is in violation of it.

The other ground relied upon by the defendant, is, that conceding the ordinance to be justified by the charter; yet the power given by it, has not been well executed, and two objections are raised; first, that by the ordinance, a report in writing is required of the existence of a nuisance, &c. by the commissioners of health, to the commissioners of the city, which does not appear to have been made. Second, that the ordinance requires the nuisance to be of such a character, as *will*, in the opinion of the commissioners, endanger the health, &c. and that the commissioners have not so stated.

There is nothing in the first of these objections. The ordinance of the 22d of March, 1807, uniting the powers and duties of the city commissioners and commissioners of health, provides for the appointment of four persons to be city commissioners and commissioners of health, with all the powers and duties united in them, of the commissioners of health and city commissioners, and surely the formality of a written report by them to themselves was necessarily dispensed with. Besides there would be an inconsistency between the two ordinances, the one uniting the two bodies into one, and the other requiring the one to make a report to the other, when no such separate bodies existed, and the ordinance of the 22d of March, 1807, expressly repeals all such parts of the ordinance of the 9th of March, 1807, as are inconsistent with any thing contained in it. An entry in the books of the commissioners of their decision is not required, and the certificates in their warrants of the existence of the nuisances and of their characters, would have been sufficient, if in other respects the ordinance was complied with. But the ordinance has not been complied with; the warrants of the commissioners should, to gratify the ordinance, have contained statements of the existence of nuisances in the respective streets specified, which *would* in their opinions endanger the health thereof, and not that they *might* do so. A positive and decided opinion is required, and not the expression of a doubt, as to the dangerous character of the nuisance to be removed. And it is evident from the terms used by the commissioners, that they had formed no decided opinion on the subject. They say in each warrant, that they conceive the street mentioned, to be in a state of nuisance *which might endanger the health of the city*, apart from the danger they speak of to the health of *the city*, instead of the health of the particular street, which is of itself a departure from the provision of the ordinance; the opinion they express, is not such as the ordinance requires. The nuisance authorised to be removed, is required to be such, as in the opinion of the commissioners *will* be dangerous, and not such as *may* by possibility be dangerous; and the second objection is we think well taken.

The second exception was properly abandoned at the argument. The ordinance requiring the evidence of the existence of a nuisance, and of its dangerous character and tendency, to be in writing, the plaintiff was not competent to prove it by oral testimony at the bar.

The action for money paid, laid out and expended, must be founded upon a contract express or implied, and it is a settled rule, that no person can by a voluntary payment of the debt of another, without his authority, make himself a creditor of the person whose debt is thus paid; but if one is compelled, or is in a situation to be compelled to pay the debt of another, as in the case of a surety, and does pay it, the law implies a promise on the part of him for whom the money is *paid*, on which an action may be sustained, for in such case, it is not a voluntary but a compulsory payment.

In this case there was no debt due by the defendants' intestate, and the payment made by the plaintiffs was on account of a contract entered into between the commissioners and the man who did the paving. But if there had been a debt due by the defendants' intestate to the workman who did the paving, which the plaintiffs were not compelled to pay, a voluntary payment by the plaintiffs without the authority or request of the defendants' intestate could not raise an assumpsit against him; and there is no evidence of any such authority or request. Or if the defendants' intestate was indebted to the plaintiffs on account of the taxes imposed, that liability would not sustain a count for money paid, laid out and expended, which is the fifth count in the declaration in this case.

And we can perceive no ground on which the construction prayed for to the jury, that the plaintiffs were entitled to recover on the sixth count for work and labor done, &c. could have been properly given. The defendants' intestate was under no legal obligation imposed by the ordinance, to pay for the paving done; and the work was not done at his instance, but by the plaintiffs, under and in pursuance of one of their own ordinances, and in the supposed exercise of their corporate powers.

We concur therefore in opinion with the court below on all the bills of exceptions.

JUDGMENT AFFIRMED.

Note. The doctrine that no person can by a voluntary payment of the debt of another, without his authority make himself a creditor of the person whose debt is thus paid, has been qualified by the *Act of* 1829, *chap.* 51, which enacts "that any assignee or assignees, *bona fide* entitled to any judgment, bond, specialty or other chose in action *for the payment of money* by assignment in writing, signed by the person or persons authorised to make the same, may by virtue of such assignment, sue and maintain an action or actions, execution or executions, in any court of law or equity in this State, as the case may require, in his, her, or their names or names against the obligor or obligors, debtor or debtors, therein named, saving and reserving to the defendant or defendants, all such legal or equitable defence as might or could have been had or maintained against the assignor or assignors at the time, and before notice of the assignment, in the same manner and to the same extent as if no such assignment had been made."

REPS.

DUGAN *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE.—*December*, 1829.

The imposition and assessment of a tax by the *Mayor and City Council of Baltimore*, under and in pursuance of their charter, creates a legal obligation to pay such tax, on which the law raises an implied *assumpsit* by the person taxed.

By the charter of the City of *Baltimore*, (act of 1796, ch. 68, sec. 10,) it is provided "that the person or persons appointed to collect any tax imposed in virtue of the powers granted by this act, shall have authority to collect the same by distress, and sale of the goods, and chattels, of the person chargeable therewith," and by the ordinance of the corporate authorities of that city of the 27th March, 1817, a tax was imposed, and the collector directed to deliver to each taxable person, an account of his assessment and tax in writing, before a given day; and if the tax should not be paid within a month thereafter, to proceed without delay to recover it agreeably to the mode prescribed by the act of incorporation. In an action brought by the *Mayor and City Council of Baltimore* to recover a tax imposed by the ordinance of 1817, it was held unnecessary to prove, that the Collector had delivered the account before mentioned to the defendant; and that his liability to be sued, in no manner depended upon the diligence or negligence of the collector.

APPEAL from *Baltimore* County Court. *Assumpsit* to recover a sum of money claimed for taxes imposed by the appellees, (the plaintiffs in the court below) on the appellant, (the defendant in that court.) It was agreed, that the acts of Assembly and ordinances referred to in the bill of exceptions, might be read from the printed copies, without being inserted in the record.

At the trial, the plaintiffs offered in evidence to the jury, an act of the General Assembly of *Maryland*, entitled: "An act to erect *Baltimore town*, in *Baltimore* county, into a city, and to incorporate the inhabitants thereof." Passed at November session, 1796, *ch.* 68. And also offered in evidence, an ordinance of the Mayor and City Council of Baltimore, entitled: "An ordinance to impose a tax on the real and personal property within the city of *Baltimore*, and to provide for the collection of the same for the year 1817, and for other purposes." and also offered in evidence, that for the year 1817, the said defendant was duly and legally assessed with real and personal property in the city of *Baltimore*, liable to taxation, to the value of $16,388, and that the taxes properly chargeable to the said defendant for the said year, amounted to the sum of $160 93, to recover which sum this suit was brought. The plaintiffs further offered in evidence, that *Thomas Rogers* was the collector of taxes for the said year, and that *Peregrine Welsh* was employed by the said *Thomas Rogers* as a clerk and agent to assist in the collection of the same, and that some time in the year 1818, the said *Peregrine Welsh* called on the defendant and demanded payment of the said sum of $160 92, due as aforesaid, but that the said defendant refused to pay the same, alleging that the Mayor and City Council of Baltimore were indebted to him. Whereupon, the said defendant prayed the opinion and direction of the court to the jury, that the plaintiffs having offered no evidence to prove, that the said collector made and delivered to the said defendant, an account in writing of the assessment and tax of the said defendant, containing the items in words at length, and the amount thereof in figures, before the first day of June, in the year 1817, or at any time before the commencement of this suit, were not entitled to recover in this action; and the defendant further prayed the opinion and direction of the court to the jury, that upon the evidence given in this cause, the plaintiffs were not entitled to recover in this action; which opinions and directions the court refused to give to the jury, but were of opinion and so directed the jury, that if the jury believed the evidence given in this cause, the plaintiffs were entitled to recover. The defendant excepted, and the verdict and judgment being against him, he prosecuted this appeal.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN and ARCHER, J.

R. Johnson, for the appellant.

J. Scott, for the appellee.

BUCHANAN, Ch. J. delivered the opinion of the court.

By the 10th section of the act of 1796, the act of incorporation of the city of *Baltimore*, authority is given to the person or persons appointed to collect any tax imposed, in virtue of the powers granted by that act, to collect the same by distress and sale of the goods of the persons chargeable therewith; with a provision, that if the tax imposed, shall be chargeable on real property, it may be recovered by action of debt, or attachment, in case no goods can be found liable to be distrained upon.

This suit was brought to recover an amount of taxes, claimed to be due and owing by the appellant, for the year 1817, in virtue of an ordinance passed by the corporation on the 27th of March, in the year 1817: "To impose a tax on the real and personal property within the city of *Baltimore*." It is not contended, that the corporation had not the power by the charter to impose taxes; nor is it denied that the particular ordinance imposing the tax in question, was passed in pursuance of the powers derived under the charter. But it is urged, that unless the provisions of the fifth section of the ordinance, directing the collector to deliver to each taxable person, &c. an account in writing, of his assessment and tax, containing the items in words at length, and the amount thereof in figures, before the 1st of June next, after the passage of the ordinance were pursued, no action would lie; and that there being no evidence of a delivery, &c. by the collector to the appellant, of such an account as is directed by the ordinance, this action cannot be maintained, and in support of this proposition, the *stat. of 2d Geo. 2d, ch.* 23, *sec.* 23, and the decisions under it are relied on. But the analogy insisted on is not perceived. The language of the *stat. of 2d Geo. 2d*, is imperative; it provides that no attorney or solicitor shall commence or maintain any action or suit, until the expiration of a month or more, after he shall have delivered a bill of his fees, &c. to the party to be charged, &c. thus expressly declaring, that no action shall either be brought or maintained, until the provisions of the statute have been first complied with; but that is not the character of this ordinance; it neither *expressly* forbids the bringing of a suit before the delivery of the account, nor *impliedly*, by authorising or directing a suit to be brought, in the event of the tax not being paid by the time prescribed. It has no relation to the bringing of a suit, but only to the summary mode provided by the charter of collecting the tax by a distress and sale of the goods. It is seen that by the 10th section of the charter, the person appointed to collect the taxes, imposed by the corporation, is impowered to do so by distress and sale of the goods of the persons chargeable with them. The 4th section of the ordinance provides for the appointment of a collector. And the 5th section, the office of which is to prescribe his duties, after providing that he shall deliver to each taxable person, an account of his assessment and tax in writing, on or before the first of June next, after the passing of the ordinance, goes on to direct him, if the tax should not be paid by the first of July following, to proceed without delay to recover it, agreeably to the mode prescribed by the act of incorporation, that is by distress and sale of the goods, and not by suit, which he had no authority either by the charter or ordinance to institute. It is true that the collector was not authorised to collect the tax by distress, and sale of the goods, without having first delivered an account of the assessment and tax to the party to be charged, according to the directions of the ordinance, who was entitled to that notice, before his property could be proceeded against in the summary mode provided by the charter, and without such notice his property could not be distrained upon and sold. But though his goods would be protected from distress and sale by the collector, it would not therefore follow, that he could not be sued by the corporation for the amount of the taxes due. His liability to be sued or not, in no manner depended upon the diligence or negligence of the collector in the discharge of his duty, as prescribed by the fifth section of the ordinance, which has no relation to that subject.

In the *Mayor and City Council vs. Howard*, 6 *Harr. & Johns.* 383, it was decided by this court in relation to the 10th section of the act of incorporation, that the giving a remedy by distress or action of debt, was *cumulative* only, and did not take away the action arising by implication, on the legal obligation to pay a claim created by law. The tax for which this suit was brought was imposed by virtue of that act, the imposition and assessment of which created the legal obligation to pay, on which the law raised an implied *assumpsit*, independent of the notice required by the fifth section of the ordinance, as a foundation for a summary mode of recovery, and unaffected by the omission of the collector to do his duty—which omission (if an account was not delivered as required by the ordinance,) though it caused the loss of the right to collect the tax by distress and sale of the goods, left the right to recover on the original implied *assumpsit* unimpaired—an assumpsit raised by the law, on the imposition and assessment of the tax, and not to arise on the delivery by the collector of an account of the assessment and tax.

JUDGMENT AFFIRMED.

WARFIELD *vs.* GAMBRILL.—*December*, 1829.

To obtain a partition of land in equity, the complainant must allege and establish a seisin in himself.

To a bill praying for a partition of lands, alleging a seisin in the complainant with others, the defendant in his answer did not respond to the averment of seisin: the cause being set down for hearing upon bill and answer, the silence of the defendant is no admission of that fact, and the complainant having taken no proof of it, his bill was dismissed.

A respondent submitting to answer must answer fully, but if the answer be defective and insufficient to meet the allegations and interrogatories of the bill, the complainant desiring a fuller response must except to the answer; if he do not, he cannot rely upon the silence of the respondent, in relation to any material allegation, but must prove it.

Where G by his last will devised certain tracts of land to his three sons in fee, and also devised to his daughters, "the right, privilege and liberty of residing and living in the houses with, and using and cultivating with themselves and their negroes, and of keeping their negroes, stock, and all their other property thereon, and with them, in common with my sons, all my lands during the term that my said daughters should remain single and unmarried," it was held that the daughters did not take an estate for life, or any other less estate, in common with their brothers, which was susceptible of partition; and that the devise to them was a mere charge for their benefit upon the lands of the testator, and incapable of alienation to a stranger. PER BLAND CHANCELLOR.

Appeal from a decree of the Court of Chancery dismissing the bill of the complainant (now appellant.)

The bill filed on the 26th December, 1825, stated that the complainant, *Launcelot Warfield* was seized in fee of seven eighths of two tracts of land in *Anne Arundel* county, called "*Friendship*" and "*What you please*," with remainder in fee of the other one-eighth on the death of the defendant *Lydia Gambrill*, who was entitled as tenant in common, with complainant during her natural life to one undivided *eighth* part. That the said *Lydia* was then in the possession of the whole, and prayed that a decree might pass for a partition of the same according to the rights of the parties.

The answer of *Lydia Gambrill* states that her father *Augustine Gambrill* died in the year 1790, leaving three sons and five daughters. That to two of his sons together with his daughters he left his dwelling plantation as tenants in common, and that they all to wit, *Richard* and *Augustine* the sons, and the five daughters held, and cultivated the same as such, until three of the daughters married, when this defendant, and the remaining sister believed they were entitled to one half of said plantation so long as they remained single. That in the year 1807, *Richard*, sold his interest to his brother *Augustine*, who as they believe was previously entitled to one fourth. The answer further states, that *Susannah* the only unmarried sister of the defendant died in the year 1824, and she submits to such decree as the Chancellor upon consideration of her fathers will may deem it just to pass.

The will of *Augustine Gambrill* referred to in the answer, contains the following clauses.

"I give and devise unto my sons *Richard Gambrill*, and *Augustine Gambrill*, and their heirs equally to be divided between them, my dwelling plantation, being parts of the tracts of land, called "*Friendship*," and "*What you please*." *Item* "I give and devise to my son *William Gambrill*, and his heirs forever, all my undivided part of the tract of land called "*Young's Success*." *Item* "I give and devise to my daughters *Lydia*, *Susannah*, *Elizabeth*, *Margaret* and *Sarah Gambrill*, the right, privilege, and liberty of residing and living in the houses with, and using and cultivating with themselves, and their negroes, and of keeping their negroes, stock, and all their other property thereon, and with them, in common with my sons *Richard Gambrill*, *Augustine Gambrill*, and *William Gambrill*, all my lands during the time that my said daughters shall remain single and unmarried."

BLAND, Chancellor at July term, 1826, passed an interlocutory decree for a partition, and ordered a commission in the usual form according to the act of Assembly, to divide the land in the proceedings mentioned, which commission accordingly issued, and was returned with a plat annexed, designating the manner in which the division had been made.

Afterwards at September term, 1826, the following decree was passed by

BLAND, Chancellor. This case standing ready for hearing, and the notes of the complainant's solicitor having been read, and the argument of the defendants solicitor having been heard, the proceedings were read and considered.

This case was submitted at the last July term without argument, or notes, or any opposition by counsel, and the interlocutory decree was accordingly signed by the Chancellor, under an apprehension, not only that a partition might be made, but that it was in reality the wish of the parties. The answer of the defendant is badly and obscurely drawn and expressed, in so much so, that even the defendant's present solicitor seemed by the course of his argument to be under an impression, that it had admitted a partition might be decreed. But it appears on a more careful consideration of the answer, that the defendant meant to state facts, and to assert, not to yield up, any of her claims, or pretensions, in any manner whatever. And in substance she has claimed all that the will of her father entitles her to, either at law or in equity. The whole case therefore now rests upon what shall be considered to be the true intent and meaning of the last will of *Augustine Gambrill* deceased.

By that will the testator gave the lands in the proceedings mentioned to his two sons *Richard* and *Augustine*, as tenants in common in fee; and to his son *William* he gave in fee another parcel of land; and then he says, "I give and devise to my daughters *Lydia*, *Susannah*, *Elizabeth*, *Margaret* and *Sarah Gambrill*, the *right*, *privilege* and *liberty* of residing and living in the houses with, and using and cultivating with themselves, and their negroes, and of keeping their negroes, stock, and all their other property thereon, and with them, in common with my sons, *Richard Gambrill*, *Augustine Gambrill* and *William Gambrill*, all my lands during the time that my said daughters, *Lydia*, *Susannah*, *Elizabeth*, *Margaret*, and *Sarah Gambrill*, shall remain single and unmarried."

The devises to his sons are in two separate and distinct parcels, and the interest given to his daughters he declares they shall enjoy "in common with his sons, *Richard*, *Augustine* and *William*." But there is no community of estate or interest given to his three sons. *Richard* and *Augustine*, take as tenants in common, but *William* takes in severalty. It is obviously not the intention of the testator, to blend that among his sons which he had so given to them in two distinct parcels. Hence he can only be understood to mean, that his five daughters shall take an interest in common with *Richard* and *Augustine*, in the lands given to them as tenants in common, and also an interest in common with *William* in the lands given to him in severalty. And consequently if the daughters were to be considered as tenants in common, of an estate for life defeasible by marriage as has been contended, they then must each of them be considered as a tenant in common, taking one *seventh* of the lands given to *Richard* and *Augustine*, and one *sixth* of that given to *William*, and not merely one *eighth* of that given to *Richard* and *Augustine*—and therefore for this reason alone the interlocutory decree of the twelfth day of July last, and the proceedings under it, are totally erroneous and cannot be allowed to stand.

But these five daughters of the testator do not take an *estate* for life, or any other *less estate* in common with their brothers, *Richard* and *Augustine*, in the lands in the proceedings mentioned, *which is susceptible of partition*. The difference of the testator's language and consequently in his intention, in the clauses of his will, in which he provides for his sons, and for his daughters is strong, and clear. To his sons *Richard*, and *Augustine*, he gives an estate as tenants in common in fee of his dwelling plantation; and to his son *William* he gives an estate in fee, and in severalty of another parcel of land, and he then, charges all his real estate thus fully disposed of, with certain uses, for the personal benefit of five daughters, as long as they continue unmarried. In such case his meaning is expressed in terms peculiarly apt, suitable, and proper. "I give and devise (he says) unto my sons *Richard* and *Augustine*, and their heirs equally to be divided between them, my dwelling plantation—and to my son *William* and his heirs forever my land called *Young's Success*." And he then gives and devises to his daughters, not *an estate*, of any kind, not an interest in any portion of his land for life, during their celibacy, or for any time or upon any condition; but as he himself perspicuously expresses it, "I give and devise to my daughters, the *right*, *privilege*, and *liberty* of living in the house with, &c. in common with my sons, all my lands, during the time they shall remain single and unmarried."

The manifest object of the testator was to provide a home for his daughters, and for that purpose he has charged all his real estate, so far as was necessary to attain his object, and no farther; in the dwelling in which he left them, or in any of the houses on his land, he gave to each of them, the *right*, *privilege*, and *liberty* of continuing to reside, or leaving, and returning to as a home, as they thought proper, at any time during their celibacy. And that this habitation, which he had thus given them, might be made as comfortable as it had been, or as it was in their power to make it, he gave them the *right*, *privilege* and *liberty*, of using and cultivating all his lands, with *themselves and their negroes*, and of keeping their negroes, stock, and all their other property *thereon, and with them*, in common with his sons. It is a devise of a personal right, privilege and liberty, to each one of his daughters; a benefit which each one might take or abandon at pleasure, so long as she remained single. It is not a devise of any *real estate*, or of a *chattel interest* to the daughters, but it is a mere charge for their benefit; upon all the lands of the testator, which is inalienable, and indivisible in its nature. It is a benefit to be taken or relinquished only by the person to whom it is given, and with whose person it is inseparately connected. Each one of the daughters might release her privilege, or as the answer states, might rent her privilege to her brother, or the holder of the land for a certain sum per annum; but neither of them could alien or transfer her privilege to a stranger, and thereby introduce a new and unwelcome inmate into her brothers household. Nor could any one of them use and cultivate the lands, in any other manner than by *themselves and their negroes*, or put upon the lands, any negroes, stock, or other property, if she herself could reside on no part of the lands, because the testator has declared, it should only be "*thereon and with them.*" It is an intangible privilege, extended over the whole of the testator's real estate, vested in each one of his daughters. It cannot be confined to the lands given to *Richard* and *Augustine*, or to those given to *William*, because it has been spread without distinction over them all. Its extent cannot be designated by any metes and bounds, or represented by any number of acres. It is an incorporeal right vested in each one of five persons, in her character of *daughter*, and *because* of that character, to dwell in any house, and to put her stock to graze in any pasture upon the whole of the testator's lands. It is therefore a mere *charge*, and not in any respect such *an estate*, in the land as is capable of being separated and partitioned off.

These charges are incumbrances upon the testator's real estate, which it appears he contemplated would be lessened, or extinguished, by the relinquishment, marriage or death of the five claimants, it seems are now reduced to one only, that is *Lydia* the present defendant, who is at this time in the perception and enjoyment of this right, privilege and liberty, which her father gave her, and which this court has neither the power nor the disposition to diminish, or impair by partition, or in any other manner whatever.

Decreed, that the bill of complaint be dismissed with costs.

From which decree the complainant appealed to the Court of Appeals.

The cause was argued before **Buchanan**, Ch. J. **Earle**, **Martin** and **Archer**, J.

A. C. Magruder and *Shaw*, for the appellant, contended, 1. That the appellee during her single life is entitled to one undivided eighth part of the land devised by her father, or if she is not so entitled, she is entitled to nothing in consequence of the devise to the daughters being unintelligible and therefore void. 2. A devise of the use of land, is equivalent to a devise of the land itself—they cited 3 *Bac. Abrid.* 391. 2 *Blk. Com.* 20.

R. Johnson for the appellee. The complainant has shown no right to ask for a partition of the lands. He shows no right or interest in himself in the land in question—no *exhibits* or title papers of any kind are filed, and the answer so far from admitting the title of complainant, affirms that the title is in another person. A party applying for a partition must show a title. *Hopkins vs. Stump*, 1 *Johns. Ch. Rep.* 111. If the answer does not deny the allegations in the bill, the complainant should have excepted to it, and he is not now at liberty to assume as true, what is not denied. *Wilkin and others vs. Wilkin*, 2 *Harr. & Johns.* 301. *Young vs. Grundy*, 6 *Cranch*, 51.

Archer, J. delivered the opinion of the court.

The complainant seeks a partition of the tracts of land described in the bill, alleging a seisin in seven-eights of said tracts, and that the respondent is in possession of, and exercising acts of ownership over the whole of the lands.

The answer of the respondent states that *Augustine Gambrill*, the father of the respondent, devised his dwelling plantation to his two sons, *Richard* and *Augustine Gambrill*, and to his five daughters; after which she states that by the intermarriage of three of her sisters, and the death of one of them, and by a sale from her brother *Richard*, to her brother *Augustine Gambrill*, she considered that she became entitled to one-third of the land, and her brother *Augustine Gambrill*, to two-thirds thereof.

The cause is set down for hearing, and an interlocutory decree passes at *July term*, 1826, for partition, and commissioners are accordingly appointed to make partition. Upon the return of the commissioners at *October term*, 1826, the Chancellor dismissed the complainants bill, from which decree this appeal has been taken.

We do not feel ourselves called upon to express any opinion on the will of *Augustine Gambrill*, but shall decide the cause upon the bill and answer.

The bill alleges a *seisin* of seven undivided eighth parts of this land, and the seisin, should have been proved by the *complainant*, or admitted by the answer. The complainant relying upon the answer exhibited no proof of seisin, but set the cause down for hearing upon the coming in of the answer.

By a reference to the answer it will be found to contain no admission of any allegation in the complainants bill, except her possession of the land. Her answer is very defective and inartificial; and it is only indeed by inference that we can arrive at the conclusion, that she is speaking of the lands referred to in the bill, but considering what is only a matter of inference, as certain, and that the lands of which she speaks, are the lands of which the complainant seeks partition, there is not only no admission of right or title in the complainant but an averment of title in herself, and *Augustine Gambrill* her brother. In this stage of the cause the complainant was called on for proof of his allegations, and exhibiting none, but setting the cause down for hearing, his bill was rightfully dismissed by the Chancellor.

But supposing there is no denial of title in the answer, and that the material allegation in the bill, the seisin of the complainant is unanswered, this is clearly no admission of any unanswered fact. Chancellor *Hanson*, 2 *Harr. & Johns.* 301, says, if any material matter charged in the complainants bill, has been neither denied nor admitted by the answers, it stands on the hearing of the cause for naught, and in 6 *Cranch*, 51, *Young vs. Grundy*, Ch. J. *Marshall*, in delivering the opinion of the court, says, "that if the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a question of dissolution of an injunction, they are to be taken as true." A respondent submitting to answer must answer fully, but if the answer be defective, and insufficient to meet the allegations and interrogatories of the bill, the complainant desiring a fuller response must except to the answer. If he do not he cannot rely on the silence of the respondent in relation to any material allegation, but must prove it.

DECREE AFFIRMED.

GOWAN *vs.* SUMWALT.—*December*, 1829.

It is the common practice, where a purchaser under a decree in Chancery is kept out of possession by the former owner, for the Chancellor to interpose the authority of that court, and cause the possession to be delivered up.

But where G purchased property at a sale under a decree, and gave his notes with S as his surety for the purchase money, which S was afterwards obliged to pay, and G then executed a deed of the same property to S, which however was left with I as an escrow, to be delivered upon a condition that did not appear to have been performed, G being in possession, could not be ousted by the authority of the Court of Chancery; and even if a mortgage had been executed by him to secure S, the proceedings in Chancery should be of a different character.

APPEAL from the Court of Chancery. The proceedings which took place on the petition which was filed in this case by the appellee, *Frederick Sumwalt*, on the 12th of April, 1826, are sufficiently set forth in the opinion delivered by this court.

BLAND, Chancellor, (March term, 1827.) This matter standing ready for hearing, and the solicitors of the parties having been heard, the proceedings were read and considered. The only question is whether in point of fact *Sumwalt* was with the consent of *Gowan* to take his place, and be considered as the purchaser from the trustees. I am satisfied from the proofs that *Gowan* did agree, that *Sumwalt* should be deemed the purchaser; and having thus failed to shew sufficient cause as required by the order of the 13th of April, 1826, it is therefore ordered that an injunction issue, commanding the said *Gowan* to deliver possession of the property in the proceedings mentioned, to the said *Sumwalt*, returnable forthwith. From this order the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER and DORSEY, J.

Flusser for the appellant, cited 4 *Com. Dig.* 473, (*Am. Ed.*) 274, (note r.) *Rob. on Frauds*, 108. *Sugd.* 68. *Newl. Pr.* 339, 142, 150. *Sugd.* 40.

Winchester for the appellee contended, that *Gowan's* rights were not affected by the decision of the Chancellor; and that an appeal would not lie from an order to deliver possession.

BUCHANAN, Ch. J. delivered the opinion of the court.

The substance of this case as it is presented to us by the proceedings, appears to be this. A decree in Chancery being passed, and trustees appointed for the sale of a certain lot or parcel of ground in the city of *Baltimore;* the premises were sold at public sale by the trustees, and purchased by *Gowan*, the appellant, who passed his notes for the purchase money, with *Sumwalt* the appellee, and another, as his sureties. The sale was regularly reported by the trustees, and ratified and confirmed by the Chancellor; and the purchase money not being paid, suits were brought, and judgments obtained against the purchaser, *Gowan*, and his securities. *Sumwalt* discharged the judgments obtained for the purchase money, and the trustees and *Gowan* united in an instrument of writing, purporting to be a deed to *Sumwalt* for the premises, which had been before sold to *Gowan*. *Gowan* continuing in possession, *Sumwalt* preferred a petition to the Chancellor, alleging that he had been substituted as the purchaser, and that a deed for the premises had been made to him by *Gowan* and the trustees, and praying an order to compel *Gowan* to deliver up the possession. *Gowan* in his answer positively denies that it ever was agreed or understood, that *Sumwalt* should be substituted in his stead as the purchaser, or that he ever was so substituted; and states that it was agreed between them, that *Sumwalt* should take a deed of conveyance of the premises from the trustees, and execute a bond to reconvey to him, on being reimbursed the amount of the purchase money by a stipulated time; and alleges that when the deed was executed, it was left by him in the hands of a third person to be delivered to *Sumwalt*, on his executing and delivering a bond to reconvey the property to him, on the terms before agreed upon, and not otherwise; but that *Sumwalt* afterwards by fraud and artifice obtained possession of the deed, and then refused to execute a bond of conveyance, and expressed his determination to hold the property. Upon the proof taken in the cause the Chancellor was of opinion, that *Gowan* did consent to *Sumwalt's* being substituted in his stead, as the purchaser, and passed an order for an injunction commanding him to deliver possession; from which order the case is brought by appeal before this court. It is the common practice where a purchaser under a decree in Chancery is kept out of possession by the former owner, for the Chancellor to interpose the authority of that court, and cause the possession to be delivered up. But that does not seem to us to be the character of this case. It is the case of one, who not being the purchaser himself, seeks to obtain the possession of the premises, by proceedings against him who was in fact the purchaser. How far this would be a fit case for this summary mode of proceeding, if it could be shown that *Gowan* did agree to permit *Sumwalt* to be substituted as the purchaser is not a question before us; there being nothing in the evidence in our opinion to establish that fact. The proof by *Mr. Moale* (one of the trustees) who prepared the deed is, that *Gowan* consented that the property should be conveyed by the trustees to *Sumwalt*, but insisted on being permitted to redeem it, by paying the amount of the judgments, and that *Sumwalt* agreed to allow him sixty days, and promised to reconvey him the property if he paid him the money, at the expiration of that time. That *Gowan* repeatedly said *Sumwalt* was ungenerous; that sixty days was not enough, and that he ought to allow him a longer time. *Mr. Harris* one of the Justices who took the acknowledgment, proves that there was some hesitation on the part of *Gowan* about signing the deed, the particulars of which he does not recollect, but that he finally signed it, with the understanding, that it was not to go out of the possession of *Mr. Israel.* Another witness swears that *Sumwalt* told him he never wanted the property for his own use, and was willing to give the time craved by *Gowan* for the payment of the money, which he said was sixty days. And *Mr. Israel*, the other magistrate who took the acknowledgment, proves that when the deed was presented to *Gowan* for signature, he hesitated about signing it, saying there was an understanding between himself and *Sumwalt* relative to the property which ought to be reduced to writing, and stated in the presence of *Sumwalt*, something not recollected by the witness, about a right to be reserved to him to have a reconveyance of the property, on his paying the purchase money, to which *Sumwalt* assented. That he the witness then proposed, that the deed should be executed, and left with him, until matters were satisfactorily arranged, to which *Gowan* agreed. That the deed was accordingly executed and left with him. That *Sumwalt* called for it once or twice in the course of a day or two afterwards, and that he refused to deliver it to him; but finally delivered it to *Mr. Moale*, who said he would see the matter arranged between the parties. There does not appear to us to be any thing in the whole of this testimony, tending to prove that *Gowan* ever agreed or intended that *Sumwalt* should be substituted in his room as the purchaser, or that it was so understood by *Sumwalt* himself, and all the evidence shows that the deed was not delivered by *Gowan* to *Sumwalt* as his deed, but was left with *Israel*, as an escrow, to be delivered on a condition that does not appear to have been ever performed. It is not therefore, and cannot be taken as the deed of *Gowan*, and consequently is no evidence of any assent on the part of *Gowan* to *Sumwalt* being taken as the purchaser. And all that can be collected from the parol evidence is, the intention of the parties, that the property should be conveyed to *Sumwalt*, as a pledge only to secure the repayment of the purchase money, and not that he should be substituted, as the purchaser, which intention was never carried into effect. And if it was; if a mortgage had been regularly executed, and delivered, the proceedings in chancery on the failure, by *Gowan* to repay the amount of the purchase money, should have been of a different character.

DECREE REVERSED.

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ACCRETION.

See Ejectment 2, 3.

ACTION—RIGHT OF.

1. When a bill of exchange is endorsed in full, all the legal interest is transferred to the endorsee, and having the legal interest, he alone is qualified to maintain an action on such bill. He cannot use the name of the payee; because the payee having transferred his interest, can have no competency to maintain an action. *Bowie use Ladd vs. Duvall*, - - - - - - - - - 175
2. But if a note or bill endorsed in full, should in the regular course of commercial dealing, come back to the hands of a prior endorser, or of the payee, it would be competent for such person as the holder, to strike out the endorsement, and sue in his own name, - - - *Ib.*
3. The value of property delivered by an administrator to a distributee, as payment of his portion of a deceased's estate, cannot be recovered back in a court of law, in consequence of such administrator being afterwards compelled by a recovery at law, to pay a debt due by the deceased, of which he was not aware when he distributed the estate; or his having in part paid the debts of the deceased, out of his own private funds. The remedy for such claims is in a court of Equity. *Turner vs. Ann Egerton*, - - - - - - - - 430
4. It is not universally true, that where one is benefitted by the payment of money by another, the law raises an *assumpsit* against the party benefitted, in favour of the party paying the money. A stranger cannot at his pleasure make me his debtor whether I will or not, by paying a debt due from me to another, - - - - - - - - - *Ib.*
5. Where one is compelled to pay the debt of another, he may recover against him in an action for money paid, upon the promise which the law implies, as in the case of money paid by a surety in a bond, which is considered as paid to the use of the principal; and may be recovered in an action against him for money paid, - - . - - - *Ib.*
6. An action at law cannot be maintained to recover back a payment in money, made by an administrator to the guardian of a distributee of his intestate. The remedy is in Equity. *Turner vs. Egerton*, - 434
7. The bond of a trustee appointed by the Chancellor to sell the real estate of a deceased person, for the payment of his debts, is not liable to be put in suit, after the trustee has sold the deceased's property, and received the money therefor, upon the order of the Chancellor distributing such proceeds among the creditors, *without* notice to the trustee of such distribution. *State use of Oyster vs. Annan*, - - 450
8. No person can by a voluntary payment of the debt of another, without his authority, make himself a creditor of the person whose debt is thus paid. *Mayor and City Council of Baltimore vs. Hughes*, - 480
9. If one is compelled, or in a situation to be compelled to pay the debt of another, as in the case of a surety, and does pay it, the law implies a promise on the part of him for whom the money is paid, on which an action may be sustained; for in such case, it is not a voluntary, but a compulsory payment, - - *Ib.*

See Insolvent Debtors.

— Assumpsit, 2, 3, 4.

ACTS OF ASSEMBLY.

1. In the construction of the statute of distributions, it has been held, that although the creditors of the deceased, are the first and special objects of its regard: yet that the next of kin, among whom the surplus is to be distributed, take an interest which vests in them immediately, in the nature of a present debt of an unascertained amount, payable at a future day; and it is clear, they can only obtain possession of their distributive shares, through and from the administrator. PER BLAND, CH'R. *Hagthorp vs. Hooke*, - - - - - - - 270
2. The acts of Assembly of 1715, ch. 47, and 1766, ch. 14, being in *pari materia*, must be construed together as one system. The first having embraced incorporeal tenements, and hereditaments, there is no reason why they should be excluded from the second. The act of 1766, cannot be confined to conveyances only by which the land itself passes, for the design was, that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records. *Hays vs. Richardson*, - 366
3. If contradictions or incongruities exist between the preamble and enacting clause of a statute, the latter shall prevail, - - - - - - - *Ib.*
4. A cotemporaneous, unvarying construction of an act of Assembly, for sixty years, ought not to be disregarded but upon the most imperious and conclusive grounds, - *Ib.*

Act of 1745, ch. 9. sect. 10, (Improvers on the water,) - - - - 249
Act of 1783, ch. 24, (Port wardens' grants,) - - - - - - - - *Ib.*
Act of 1785, ch. 46, sect. 7, (Set off,) - - - - - - - - - 440
Act of 1795, ch. 54, (Charter of the City of *Baltimore*,) - - - - 480
Act of 1796, ch. 68, (Supplement to the Charter of the City of *Baltimore*,) - - - - - - - - 499
Act of 1805, ch. 110, (Insolvent Debtors,) - - - - - - - - - 231
Act of 1823, ch. 95, sect. 3, (Alimony, grant of adjudged void,) - - 463
Act of 1825, ch. 123, (Writs of possession, to purchasers at Sheriff's Sales,) - - - - - - - - 443

AGENT.

See Shipping, 1 to 7.

AGREEMENT.

See Court of Chancery, 30, 31, 32, 33.
— Damages, 2, 3.
— Shipping, 2, 3, 7, 9.

ALIMONY.

The suit for alimony in this State is a distinct remedy from the proceedings to obtain a divorce, and for a series of years the wifes' maintenance has been recoverable through the intervention of our judicial tribunals. *Crane vs. Meginnis*, - - - - - - - - - 463

ALLUVION.

See Ejectment, 2, 3.

AMENDMENT.

See Execution, 2.

ANSWER IN CHANCERY.

See Court of Chancery, 12, 13, 14, 16, 18, 26, 42, 43.

APPEAL.

1. After an injuntion had been granted, prohibiting the defendant from obstructing a public road, *the Commissioners of Baltimore County* authorised the same road to be shut up. The defendant, who was the owner of the land over which the road passed, without moving, or waiting for a dissolution of the injunction, shut it up. The Chancellor excused this violation of the injunction, upon the ground, that the defendant had misapprehended his rights; but ordered him to place the road in its former condition; this not being done, the defendant was brought before the Chancellor by attachment. The injunction was then ordered to be continued, until final hearing or further order; and the defendant to remove the obstructions, and for his contempt in not removing them since the previous order, was fined. From these proceedings the defendant appealed. Upon a motion to dismiss the appeal, it was held, that the order of the commissioners, directing and authorising the old road to be shut up, placed the premises over which it formerly run, under the control of the defendant; and gave him the

same right of user of the land of that road, that he had of the rest of his estate; and that the subsequent orders of the Court of Chancery, so affected his rights and interests therein, as to form a fit subject of appeal. *Williamson vs. Carnan*, - - - - - - - - - 184

2. In a cause which had been set down for hearing, the Chancellor, after argument of counsel, proceeded to discuss many rules and principles of equity, and a great variety of facts, as applicable to the subject under consideration; and announced his intention at some future day to decree accordingly. To enable him to do so, he referred the cause to the auditor, to state an account in conformity to his views, from the proceedings and proofs then in the cause; or from such other proofs as might be adduced by the parties, which they were respectively authorised to introduce, upon notice, before a given day. In this state of the cause, an appeal was taken; and upon a motion to dismiss it, HELD, that the order in question did not so settle, or materially affect, all, or any of the rights or interests in controversy, as to make it a decretal order, from which an appeal would lie; that it was a mere preparative to the decision of the cause, and not *decretal;* and that it was only from what the Chancellor had done, that is, adjudged or decreed, and not from what he intends to do, that an appeal would lie. *Hagthorp vs. Hook*, - - - - - 270

3. T died in a foreign country, leaving his partner K his executor there; who, upon his return to *Maryland*, renounced all right to administer upon T's estate here. Letters of administration were then granted to the complainant, who filed a bill against K and D, requiring an account and settlement of various claims; some of which related exclusively to transactions of a partnership which had subsisted between K, D, and T; others, to demands of the intestate against both of his surviving partners; and others, to misapplications of the intestate's property, by both and each of them after T's death. The dates of these transactions were not alleged. To this bill, D pleaded in bar: "That he finally settled and adjusted with K, executor of T, deceased, after the death of the said T, an account in writing; and by said account, the balance due to the defendant by the estate of the said T on the 25th Oct. 1823, was admitted to be, &c. which account is just and true." The complainant demurred. The Chancellor over-ruled the plea, and ordered the defendant to answer over. HELD, that an appeal did not lie from this order, which decided a mere question of pleading, and settled no right between the parties, and that this plea was void for uncertainty. *Danels vs. Taggart's Adm'r*, - - - - - - - - 311

ASSUMPSIT.

1. The action for money paid, laid out, and expended, must be founded upon a contract express or implied. *Mayor and City Council of Baltimore vs. Hughes*, - - - 480
2. A tax imposed by a municipal corporation, cannot be recovered on a count for money paid, laid out, and expended; although such corporation has paid the cost of the improvement, for which the tax was created, - - - - - *Ib.*
3. Nor can the cost of such an improvement, or any part thereof, be recovered from a defendant liable to pay tax therefor, on a count for work and labor, where the ordinance under which the work was done has not been properly pursued, so as to create a legal liability in the defendant, - - - - *Ib.*
4. The imposition and assessment, of a tax by the Mayor and City Council of Baltimore, under and in pursuance of their charter, creates a legal obligation to pay such tax, on which the law raises an implied *assumpsit* by the person taxed. *Dugan vs. The Mayor and City Council of Baltimore*, - - - - - 499

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See Promissory Note, 3, 5.

BILL OF RIGHTS.

See Constitutional Law.

BOND.

1. Obligations in which many persons are interested, may be taken in the name of the State, whenever the law is silent in naming the obligees to whom they are to be given. *Kiersted, &c. vs. The State use, &c.* - - - - · - - - 231
2. The bond of a Trustee appointed by the Chancellor, to sell the real estate of a deceased person for the payment of his debts, is not liable to be put in suit, after the Trustee has sold the deceased's property and received the money therefor, upon the order of the Chancellor, distributing such proceeds among the creditors, *without* notice of such distribution. *State use of Oyster vs. Annan,* - - - - - - - - 450

BRITISH DECISIONS.

1. English decisions made since the revolution, have no authoritative force here. *Bowie use Ladd vs. Duvall,* - - - - - - - - 175

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See Inferior Jurisdiction, 1, 2, 3, 4, 5.

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See Court of Chancery.

CHARTER PARTY.

See Shipping, 7, 8, 9, 10.

COLLECTOR OF TAXES.

See Mayor and City Council of Baltimore, 10.

COMMISSIONERS OF BALTIMORE COUNTY.

See Court of Chancery, 1.

COMPULSORY PAYMENTS.

See Action, right of, 3, 5, 8, 9.

CONSIGNEE.

See Shipping, 5, 6, 7.

CONSTITUTIONAL LAW.

1. The constitution of this State, composed of the declaration of rights and form of government, is the immediate work of the people in their sovereign capacity; and contains standing evidences of thei permanent will. It portions out supreme power, and assigns it to different departments; prescribing to each the authority it may exercise, and specifying, that from the exercise of which it must abstain. *Crane vs. Meginnis,* - - - 463
2. The public functionaries move in a subordinate character, and must conform to the fundamental laws or prescripts of the creating power. When they transcend defined limits, their acts are unauthorised, and being without warrant, are necessarily to be viewed as nullities, - - - - - - - - - *Ib.*
3. The legislative department is nearest to the source of power, and is manifestly the predominant branch of the government. Its authority is extensive and complex, and being less susceptible on that account of limitation, is more liable to be exceeded in practice, - *Ib.*
4. Its acts out of the limit of authority assuming the garb of law, will be pronounced nullities by the Courts of Justice; it being their province to decide upon the law arising in questions judicially before them, and upon the constitution as the paramount law, - - - - - - - - *Ib.*
5. The check to legislative encroachments is to be found in the declaration, that the legislative, executive and judicial powers, ought to be kept separate and distinct; and the solemn obligations of fidelity to the constitution under which all legislative functions are performed, - *Ib.*
6. Divorces in this State from the earliest times, have emanated from the General Assembly; and can now be viewed in no other light, than as regular exertions of legislative power, - - - - - - *Ib.*
7. The 3d section of the act of 1823, *ch.* 95, by which the legislature required a husband to pay a trustee for the use and benefit of his wife, from whom such act divorced him, a sum certain annually, is an exercise of judicial authority, repugnant

to the constitution of *Maryland*, and void, - - - - - - - - - *Ib.*

CONSTRUCTION.

1. Obligations in which many persons are interested, may be taken in the name of the State, whenever the law is silent in naming the obligees, to whom they are to be given. *Kiersted, &c. vs. The State use, &c.* - - - - - - - - 231
2. A consistent and uniform practice under various acts of Assembly, passed in relation to the same subject, so fully establishes the contemporaneous construction of the first act in the system, that after twenty years, it has too long obtained, to be shaken and disturbed, - *Ib.*
3. So bonds with condition for the appearance of insolvent debtors, made to the State as obligee, are sanctioned by the uniform practice of twenty years, although the acts of Assembly, under which they are required to be executed, contain no specific provision for making them to the State, and creditors may bring suits on them, for their use, though not expressly authorised by law to sue, - - - - *Ib.*
4. Where an agreement contains provisions, which by reason of some technical principle of law, cannot be carried into effect, according to its literal import, it is the duty of a Court of Equity for the sake of the intent, to give it that construction which the rules of law will tolerate, and the intention of the parties, to be collected from the whole instrument, will justify. *Coale, et ux. vs. Barney, et ux.* - - - - - - 324
5. The rule that a Court of Equity will sometimes adopt a more liberal and enlarged construction than prevails at law, can never be tolerated, unless it be necessary to effectuate the motives which induced a contract. *Union Bank of Maryland vs. Edwards*, - - - - - - - 346
6. For the principles which govern those cases, in which the owner of a ship and cargo, exercises his right of breaking up or changing his ship's voyage; and by which the effect of the action of that right upon the contract of the ship-master or supercargo, is to be determined. See Shipping, 1, 2, 3.
7. For an instance of several agreements upon the subject of freight, construed in connexion with each other, and with reference to the political regulations of the country to which goods were to be carried. See Shipping, 7.

See Act of Assembly, British Statutes.

CORPORATION.

A corporation must act within the limits of its delegated authority, and cannot go beyond it; yet it ought not by construction be made to mean that which is not clearly expressed; but when its ordinances will admit of two constructions, they should receive that which is consistent with the power given, and not that which is in violation of it. *Mayor and City Council of Baltimore vs. Hughes*, - - - 480

COUNTY COURT.

The County Court have no power to review the judgment of the Levy Court, upon the question, whether the public convenience requires an alteration in a public road. PER ARCHER, J. *Williamson vs. Carnan.* 195

COURT OF CHANCERY.

1. After an injuntion had been granted, prohibiting the defendant from obstructing a public road, *the Commissioners of Baltimore County* authorised the same road to be shut up. The defendant, who was the owner of the land over which the road passed, without moving, or waiting for a dissolution of the injunction, shut it up. The Chancellor excused this violation of the injunction, upon the ground, that the defendant had misapprehended his rights; but ordered him to place the road in its former condition; this not being done, the defendant was brought before the Chancellor by attachment. The injunction was then ordered to be continued, until final hearing or further order; and the defendant to remove the obstructions, and for his contempt in not removing them since the previous order, was fined. From these proceedings the defendant appealed. Upon a motion to dismiss the appeal, it was held, that the order of the commissioners, directing and authorising the old road to be shut up, placed the premises over which

it formerly run, under the control of the defendant; and gave him the same right of user of the land of that road, that he had of the rest of his estate; and that the subsequent orders of the Court of Chancery, so affected his rights and interests therein, as to form a fit subject of appeal. *Williamson vs. Carnan*, - - - - - - - - - 184

2. Where the Chancellor entertains a doubt as to the propriety of granting an injunction at all, or where, when granted, it operates in restraint of public commissioners for the opening a road, street, or the like; or it altogether stops, retards, or embarrasses the operation of a large manufacturing establishment, or restrains a public ferry, in these and some other cases of a very peculiar nature, it has been the practice in the first instance, or on application, to appoint a very early day for the hearing of the motion of a dissolution of the injunction, and that too, either with or without answer. PER BLAND, CHAN'R, - - - - . . . - 184

3. But where upon a defendant's own shewing, the injunction operates in restraint of a right, which he has but recently acquired, or has not long decidedly and exclusively enjoyed, and there is nothing peculiar in the case, so as to require a departure from the general rule, it must, as in other cases where individuals only are restrained, take the course of the court, IB. - *Ib.*

4. Whether an inferior tribunal with jurisdiction over a given subject, has proceeded to exercise it upon such subject correctly, or erroneously, or has in any respect neglected, or disregarded, its prescribed modes and forms, is not for the Chancellor to determine, where he has no revising or superintending authority over it, IB. - - - *Ib.*

5. Chancery will restrain a party from doing an act injurious to an individual, or which may be prejudicial as a public nuisance, pending any judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness is to be determined, IB. - *Ib.*

6. Where the facts charged in a bill were all admitted to be true by the pleadings, and there was no replication, but the parties agreed that the Chancellor might take the papers and decide the cause; by such agreement the cause is set down for hearing, and whether the proceedings of the defendant be regarded as a plea, or as an answer, the question submitted, is on their legal sufficiency to bar the plaintiff's claim. *Tiernan vs. Poor, et ux. et al.* - - - - - - - - 216

7. When an instrument of writing is designed to operate as a transfer of property, and proper and apt terms are used, whereby the meaning of the parties can be clearly ascertained, if some circumstances are omitted to give it legal validity, which deprive it of its intended, specific operation, a Court of Equity will set it up as a contract, or as evidence of a contract; and when the rights of innocent third parties would not thereby be affected, will, as between the parties to such instrument, carry it into specific execution; *provided* it be founded upon a valuable consideration, - - - - - - - - - - *Ib.*

8. P and his wife, in consideration that T would give up a lien which he held upon P's personal property, agreed to execute a mortgage of certain real property, which, by a post-nuptial settlement, had been conveyed to trustees for the sole use of the wife, with power to her to "sell, convey and dispose of the same, absolutely in such manner as she might think proper to direct, without the concurrence of her husband, and from and after her decease, such parts of the property as should be left undisposed of, by her deed or contract," was conveyed in trust to her children. In pursuance of such agreement, T gave up his lien, and P and his wife executed a deed to T, for some of the trust property. The deed was in the usual form of a mortgage, except that the wife was not examined apart from her husband, by the justice of the peace who took her acknowledgment, and according to the Acts of Assembly passed in relation to deeds executed by *femes covert* grantors. Upon a bill filed by T, praying a sale of the mortgaged premises, the court held, that whether the instrument of writing which forms the basis of this call, for the interposition of a

Court of Equity, be in fact a mortgage, in its legal and technical sense, in consequence of its not having been acknowledged in the manner which the acts of Assembly require, it was not necessary to determine; but it was clearly intended to be a mortgage, and within the limits of the wife's disposing power; and therefore decreed the property mentioned therein to be sold, - - - - - - - - - *Ib.*

9. The title to the assistance of a court must be exposed by the pleadings; but the style and character of pleading in equity, has always been of a more liberal cast than that of other courts; as mispleading in matter of form there, has never been held to prejudice a party, provided the case made is right in substance, and supported by proper evidence, - - - - - - *Ib.*

10. In a cause which had been set down for hearing, the Chancellor, after argument of counsel, proceeded to discuss many rules and principles of equity, and a great variety of facts, as applicable to the subject under consideration; and announced his intention at some future day to decree accordingly. To enable him to do so, he referred the cause to the auditor, to state an account in conformity to his views, from the proceedings and proofs then in the cause; or from such other proofs as might be adduced by the parties, which they were respectively authorised to introduce, upon notice, before a given day. In this state of the cause, an appeal was taken; and upon a motion to dismiss it, HELD, that the order in question did not so settle, or materially affect, all, or any of the rights or interests in controversy, as to make it a decretal order, from which an appeal would lie; that it was a mere preparative to the decision of the cause, and not *decretal;* and that it was only from what the Chancellor had done, that is, adjudged or decreed, and not from what he intends to do, that an appeal would lie. *Hagthorp vs. Hook,* - - - - - 270

11. A, by deed, conveyed certain real and personal chattels to I, upon the proviso, that if I, his executors, &c. should absolutely omit, neglect and refuse to pay certain creditors of A, recited in the deed, their just demands, then the deed should be void. This property came to the hands of I, and after his death, passed to his administrators and the other defendants claiming under him, and them. Upon a bill filed by the administrator *de bonis non* of A, praying that the property may be accounted for, and together with the rents and profits delivered up, it appeared that some part of the chattels real was still in the hands of I's representatives, some claimed by those who had purchased with a reference to the original conveyance, and the residue by those who offered no proof of being purchasers for value without notice. The Chancellor decreed that the deed would be considered a mortgage, and nothing having occurred to destroy its redeemable quality—but one of A's creditors having been paid, directed the auditor to state an account, in which I's representatives must be charged with the value of the whole of the personal chattels, and interest thereon, from the date of the deed from A to I; and with the rents and profits of the real chattels from the same date, and until the time when they passed into the hands of the other defendants; who were responsible during the time they respectively had possession. And that I's representatives would be held liable for all rents, and profits, which the other defendants should fail, or be unable to pay, giving them credit for the debt paid. PER BLAND, CHANCELLOR, - - - - - - - - - *Ib.*

12. When the general replication is put in, and the parties proceed to a hearing, all the allegations of the answers which are responsive to the bill, shall be taken for true, unless they are disproved by two witnesses, or by one witness with pregnant circumstances, IB, - *Ib.*

13. Every allegation of the answer, which is not directly responsive to the bill, but sets forth matter in avoidance, or in bar of the plantiff's claim, is denied by the general replication, and must be fully proved, or it will have no effect, IB. - *Ib.*

14. If a defendant submit to answer at all, he must answer fully and particularly; not merely limiting

his responses to the interrogatories of the bill ; but respond to the whole and every substantial part of the plaintiff's case : he is not, however, bound to go further, and to answer interrogatories asking a disclosure of matter, no way connected with or material to the case. Ib. - - - · - - - *Ib.*

15. In Equity, an executor or administrator is considered as a trustee of the creditors, legatees, and next of kin of the deceased ; is expected and required to preserve the property of the deceased apart from his own; and if he does so, the court will do every thing that can be done to assist him, Ib. - *Ib.*

16. When the answer in the body of it, purports to be an answer to the whole bill, but the respondent declares, that he is entirely ignorant of the matters contained in the bill, and leaves the plaintiff to make out the best case he can, or uses language to that effect; and the plaintiff files the general replication, all the allegations of the bill are thus denied, and put in issue ; and consequently all of them must be proved at the hearing, Ib. - *Ib.*

17. The rule in relation to trusts by implication, or operation of law, is by no means so large, as to extend to every mere voluntary conveyance, Ib. - - - - - - - *Ib.*

18. Where the nature of the transaction charged in the bill, is such a one as must have been altogether within the knowledge of the intestate, the administrator may answer as he is informed and verily believes, but the answer of an administrator must always be taken, as well with a reference to the reason given for his belief, as to the nature of the subject of which he speaks, Ib. - - - - - *Ib.*

19. A purchaser for a valuable consideration without notice will not be disturbed in equity, Ib. - *Ib.*

20. A purchaser with a knowledge of the trust becomes himself the trustee, and stands in the place of the vendor, under whom he claims, Ib. *Ib.*

21. A purchaser with notice, from another purchaser without notice, may protect himself by the want of notice in his vendor, Ib. - *Ib.*

22. When a purchaser cannot make title, but by a deed which leads him to a knowledge of the fact; and more especially, when the deed by virtue of which he takes, recites, or directly refers to the instrument, in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a purchaser with notice, Ib. - *Ib.*

23. Under the head of just allowances, it has long been the course of this court, to allow a trustee or mortgagee in possession, for all necessary expenses incurred for the defence, relief, protection and repairs of the estate. And when a mortgagee thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he should be allowed the value of them, Ib. *Ib.*

24. The estimate of the value of such lasting improvements, is to be taken as they are, at the time of accounting, or passing the final decree; and in charging rents and profits the estimate must not include those arising exclusively from such improvements, Ib. - *Ib.*

25. T died in a foreign country, leaving his partner K his executor there ; who, upon his return to *Maryland*, renounced all right to administer upon T's estate here. Letters of administration were then granted to the complainant, who filed a bill against K and D, requiring an account and settlement of various claims; some of which related exclusively to transactions of a partnership which had subsisted between K, D, and T ; others, to demands of the intestate against both of his surviving partners; and others, to misapplications of the intestate's property, by both and each of them after T's death. The dates of these transactions were not alleged. To this bill, D pleaded in bar : "That he finally settled and adjusted with K, executor of T, deceased, after the death of the said T, an account in writing ; and by said account, the balance due to the defendant by the estate of the said T on the 25th Oct. 1823, was admitted to be, &c. which account is just and true." The complainant demurred. The Chancellor over-ruled the plea, and ordered the defendant to answer over. HELD, that an appeal did not lie from this order, which decided a

mere question of pleading, and settled no right between the parties, and that this plea was void for uncertainty. *Danels vs. Taggart's Adm'r*, - - - - - - - - - 311

26. The plea of an account stated to such a bill as the above cannot be sustained, unlesss it be supported by answer, denying the receipt of any part of the money, for which the defendant is called upon to account, subsequently to the time when the account stated, was adjusted. - - - - - - - - *Ib.*

27. By taking issue on a plea in equity, the plaintiff admits its sufficiency as a bar, if the facts which it asserts are established by proof; and if on such an issue, the matter of the plea is proved, the bar is complete, and the bill must be dismissed. - - - - - - - - *Ib.*

28. Upon a merely equitable estate, no writ of partition can be maintained at law. *Coale, et ux. vs. Barney, et ux.* - - - - - - - 324

29. A failure to comply with an engagement to do a mere nugatory act, ought not to impair the rights of a complainant in equity to relief, when the facts of his case, otherwise concur, to sustain his bill. - - - - - - - - - *Ib.*

30. An agreement was entered into, on the 27th November, 1813, between the *cestui que trusts* for life, and remainder in fee, and the trustee, of a certain trust estate, held by the latter in fee, the object of which was to lease out the trust property then unimproved, and secure to the *cestui que trusts* in remainder, an immediate participation in the rents. For that purpose it was agreed, that the trustee should appoint an agent, to make leases for ninety-nine years, with liberty of renewal, *for such rents as should be thought reasonable by the parties interested*, payable annually during the terms, to the agent in trust, as follows:—viz. one half to one *c. q. t.*, in remainder, during her life; and after her death, to her children, their *executors and administrators;* one fourth to another *c. q. t.*, in remainder for life, with a similar reservation to her children, &c. The other fourth, to the *c. q. t.* for life, during her life, and after her death to the last above mentioned *c. q. t.* in remainder, her *executors and administrators*. On the 29th September, 1823, a bill was filed by two of the *c. q. t.*, against the third, for a specific execution of the agreement, upon the ground that the defendant, since the year 1818, had prevented the execution of the leases, and refused to do any act, towards carrying the contract into effect. This charge being established, and it appearing that the parties were near relations, and that the complainants had made frequent efforts for an amicable arrangement, IT WAS HELD, that there was an adequate consideration to support this agreement, for the violation of which damages to the full extent of the injury sustained, might be recovered; that the complainants had not slept upon their rights in such a way, as to shew the contract had been abandoned; that Chancery has power to grant adequate relief, which could only be done by providing the means, necessary to carry into effect the leading object of the parties, the leasing the property at reasonable rents; and that in doing this, it was the duty of the court, to gratify the minor provisions of the agreement, so far as it could be done consistently, with the accomplishment of the grand design, - - - - - - - - *Ib.*

31. The defendant, in this case, was deemed to have forfeited the right of fixing the reasonableness of the rents, to be reserved in the leases referred to in the preceding contract, by shewing her determination to act in such a way, as to render her exercise of that right wholly inconsistent with the relief due to the complainants, and her right was therefore transferred to a trustee appointed for the purpose of executing the agreement; which trustee was enjoined to execute leases, for such rents, as he, together with the complainants, should think reasonable, - - *Ib.*

32. Where an agreement contains provisions, which, by reason of some technical principle of law, cannot be carried into effect, according to its literal import, it is the duty of a court of equity, for the sake of the intent, to give it that construction which the rules of

law will tolerate; and the intention of the parties, to be collected from the whole instrument, will justify, *Ib.*

33. So the interests of the *cestui que trusts*, in remainder, in the property referred to in the preceding agreement being real, and not personal estate, and as such, could not be limited to their *executors and administrators*. The court decreed the rent to be paid to the *c. q. t.* and their *heirs*, and this as to all the parties entitled to such rents, - *Ib.*

34. The rule, that a court of Equity will sometimes adopt a more liberal and enlarged construction than prevails at law, can never be tolerated, unless it be necessary to effectuate the motives which induced a contract. *Union Bank of Maryland vs. Edwards*, - - - 346

35. Relief, by the doctrine of substitution, is never extended to a security, but upon the assumption that the creditor's debt has been, or is to be fully paid—that his further detention of the mortgaged property, is against equity and good conscience, - - - - - - - - *Ib.*

36. So where a mortgage was executed, for the purpose of securing the payment of all or every sum or sums of money, then owing, or which might thereafter be due and owing from the mortgagor to the mortgagee, upon any promissory note, or notes negotiated or to be negotiated with the mortgagee, of which the mortgagor might be drawer or endorser, or otherwise however, and upon sale of the mortgaged premises, the proceeds being insufficient to pay a note of the mortgagor's to the mortgagee, for which the latter had no other security than the mortgage; *it was held*, than an accomodation endorser on the note of the mortgagors, discounted by the mortgagee after the execution of the mortgage and before the sale, could not call upon a court of equity to distribute the fund above mentioned, rateably, in payment of both notes, - - - *Ib.*

37. A complainant filed an exception to an answer, and the County Court without deciding upon it, referred the case to the Auditor, who stated an account, rejecting a credit claimed by the defendant's answer; to this, exceptions were also filed, and over-ruled, and the account ratified. Upon appeal, *it was held*, that the County Court had acted prematurely, that after the exceptions to the answer had been decided on, the case should have been set down for argument on bill and answer, or a replication to the answer put in, and an opportunity afforded to the respondent, to make out his defence, by proof. *Egerton, et al. vs. Reilly, et ux.* - 393

38. A bill was filed in June, 1823, and the usual process of *subpœna* and attachment issued, which were served on the defendant from term to term, until March, 1824. He failing to appear, the Chancellor passed an order to take the bill *pro confesso*, which was also served on the defendant the 1st of May following. The cause was then proceeded in to final decree in August, 1825, and a *fieri facias* issued, returnable to December term, 1825, at which term the original defendant with others alleged to be interested in the decree, filed a bill to have the execution countermanded, the decree opened, and an answer of the defendant to the first bill accepted. The grounds of this application were, that the claim was unfounded, that proper parties were not originally made, and that the defendant had been prevented by the omissions of his counsel prior to June, 1824, and by accident in the transmission of his answer since that time, from putting in his answer as he designed and intended. Upon this the Chancellor countermanded the execution, and after answers were filed controverting this application, rescinded the decree of August, 1825, and all proceedings subsequent to July, 1824. *Upon appeal it was held*, not to be consistent with the salutary exercise of that sound discretion which the Court of Chancery possesses, to open or discharge the enrollment, and vacate the decree in this case, for the purpose of enabling the defendant to make his defence. *Burch, et al. vs. Scott*, - - - - - - - - 393

39. A decree of the Court of Chancery is to be considered and taken as enrolled, when it is signed by the Chancellor, and filed by the register, and the term has elapsed during which it was made, - - *Ib.*

40. A divorced wife may recover

(having merits) a maintenance suitable to her station in life, and to quadrate with the situation of her husband by a bill in Chancery. *Crane vs. Meginnis*, - - - - 463

41. To obtain a partition of land in equity, the complainant must allege and establish a seisin in himself. *Warfield vs. Gambrill*, - - - 503

42. To a bill praying for a partition of lands, alleging a seisin in the complainant with others, the defendant in his answer did not respond to the averment of seisin: the cause being set down for hearing upon bill and answer, the silence of the defendant is no admission of that fact, and the complainant having taken no proof of it, his bill was dismissed, - - - *Ib.*

43. A respondent submitting to answer must answer fully, but if the answer be defective and insufficient to meet the allegations and interrogatories of the bill, the complainant desiring a fuller response must except to the answer; if he do not, he cannot rely upon the silence of the respondent, in relation to any material allegation, but must prove it, - - - - - - - - - - - *Ib.*

44. It is the common practice where a purchaser is kept out of possession by the former owner, for the Chancellor to interpose the authority of that court, and cause the possession to be delivered up. *Gowan vs. Sumwalt*, - - - - - 511

45. But where G purchased property at a sale under a decree, and gave his notes with S as his surety for the purchase money, which S was afterwards obliged to pay, and G then executed a deed of the same property to S, which, however, was left with I as an *escrow*, to be delivered upon a condition that did not appear to have been performed; G being in possession, could not be ousted by the authority of the Court of Chancery. And even if a mortgage had been executed by him to secure S, the proceedings in Chancery should be of a different character, - - - - - - - - - *Ib.*

See Action—right of, 3, 6.

DAMAGES.

1. In an action on an insolvent debtor's bond for his appearance, the amount of the creditors debt is the measure of damages; and neither the poverty of the applicant, nor the fact that no allegations were filed against the insolvent, constitutes a defence. *Kiersted, &c. vs. The State use, &c.* - - - - 231

2. In an action upon an agreement, by which, after reciting that D had sold to W tracts or parcels of land, sold by A to C and R, and by their agents sold to D, and for which, D had executed a deed to W; D covenanted with W, that a deed should be executed to him, conveying to him the said lands of C and R, by a given day, and to that, bound himself in a certain penalty;—such penalty cannot be recovered as liquidated damages, it was only intended by the parties as a security for the faithful performance of the contract. *Dyer vs. Dorsey and Edelen*, - - - - - - - - 440

3. In this case, the sum of money which it might be necessary to pay, for obtaining the title of C and R, would furnish the true measure of damages, for a breach of D's covenant, the proof of which sum was on the plaintiff; and it appearing that the plaintiff had not paid D the whole of the purchase money for the said lands, the jury were properly instructed, that in estimating the amount of damages, they should, under the act of 1785, *ch.* 46, *sec.* 7, deduct whatever sum of money remained in the hands of the plaintiff on account of said purchase, - *Ib.*

See Evidence, 3.

DECREE IN CHANCERY.

A decree of the Court of Chancery, is to be considered and taken as enrolled, when it is signed by the Chancellor, and filed by the Register, and the term has elapsed during which it was made. *Burch, et al. vs. Scott*, - - - - - - 393

DECRETAL ORDER.

See Appeal, 1, 2, 3.

DEVISE.

See Manumission of slaves, 1, 2.
— Wills.

DISTRESS.

See Replevin, 1.

DISTRIBUTEE AND DISTRIBUTION.

See Acts of Assembly, 1.
— Executors and Administrators, 3.
— Action—right of, 3, 6.

DIVORCES.

Divorces in this State, from the earliest times, have emanated from the General Assembly; and can now be viewed in no other light, than as regular exertions of legislative power. *Crane vs. Meginnis*, - 463

EJECTMENT.

1. It is true, as a general principle, that the lines of a tract of land originally run by course and distance, without calls, must be confined to the course and distance, and cannot be extended beyond them. *Giraud's lessee vs. Hughes, et al.* - - - - - - - - - 249
2. Where a tract of land lies adjacent or contiguous to a navigable river or water, any increase of the soil, formed by the water gradually or imperceptibly receding, or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land. It is not upon the principle that the land calls for the water; but, because it adjoins the water, that the owner acquires a title to the soil so formed, *Ib*
3. In ejectment it appeared, that the land, for which the action was brought, and which had been recently patented as vacant land, had been formed by the gradual recess of the waters on the shores of the river *Patapsco;* and that another tract of land the lines of which ran into, though they did not call for the water, where the recession took place, had been patented many years before. The defendant claiming title under the grant of this last tract, HELD that the action could not be sustained, - - - - - - - - - - *Ib.*
4. The Port Wardens of *Baltimore* by the act of 1783, ch. 24, were authorized to grant permissions to make wharves, but in order to vest a title in any such wharf, it is essential by the provisions of the act of 1745, ch. 9, sec. 10, that the grantee should have completed it according to his permission, - *Ib.*
5. A return by the sheriff to a writ of *fieri facias*, that he had levied upon a part of a tract of land called B, supposed to contain, &c. would be unavailing in ejectment to prove title in a purchaser. *Clarke vs. Belmear*, - - - - - - - 443

See Execution, 5.

ENROLMENT.

See Way—right of, 1.
—— Court of Chancery, 38, 39.

EQUITY JURISDICTION.

See Court of Chancery.
—— Action—right of 3, 6.

EVIDENCE.

1. No person who is called as a witness, not being a party to the suit, can refuse to give testimony on the ground, that he may thereby become liable to a civil action not of a penal nature; or sustain pecuniary loss; or that the verdict may be used as evidence against him in some other civil proceeding then pending, or which may thereafter be instituted. *Hays vs. Richardson*, - - - - - - - - - - 366
2. A witness on the *voir dire*, may by the party objecting to his examination in chief, for the purpose of shewing his interest, be called on to state the contents of written instruments, which are not produced; and the reason assigned is, that the party objecting, could not know previously, that the witness would be called, and consequently, might not be prepared with the best evidence to establish his objction, *Ib.*
3. In an action upon a bond, with condition that the obligor, the defendant, should exhibit all the papers concerning and touching the estate of the late W, deceased, to B, mutually appointed by the obligor and obligee to settle said estate, issue was joined upon a replication, which assigned as a breach, the failure to exhibit such papers. HELD, that it was competent for the plaintiff to offer in evidence, an inventory of W's personal estate, returned by the defendant as his administrator to the Orphan'sCourt, it being a paper concerning the estate of W, necessary to its settlement, one which by the condition of the defendant's bond, should have been exhibited to B, and proper to enable the jury to ascertain the amount of damages to be awarded to the plaintiff. *Halkerstone's Ex. vs. Hawkins*, - - - - - - 437

4. It is not competent to prove by oral testimony the existence of facts to be ascertained by public commissioners, preparatory to laying a tax, which such commissioners are required to certify in writing. *Mayor and City Council of Baltimore vs. Hughes*, - - . - 480

See Jury, 1.

— Shipping, 7.

— Promissory Note, 6.

— Court of Chancery, 21.

EXECUTION.

1. A return by the sheriff to a writ of *fieri facias*, that he had levied upon "part of a tract of land called B, supposed to contain, &c." is not sufficient, would be quashed on motion, and unavailable in ejectment to prove title in a purchaser. *Clarke vs. Belmear*, - - - - 443
2. A purchaser at a sheriff's sale is entitled to the benefit of that officer's return, both to the *fieri facias*, and *venditioni exponas;* and when the description of the subject levied on, according to the schedule returned under the first writ, is defective, it may be amended and rendered certain, by the return of the sheriff's proceedings, under the second writ, - - - - - - *Ib.*
3. So a levy under a *fieri facias* which is defective in the description of the property levied on, may be amended by the sheriff's return of the property sold under such writ, the return of the sale describing the property with sufficient certainty, - - · - - - - - - *Ib.*
4. A purchaser under a judicial sale has a right to resort to the whole judicial proceedings, under which his title accrued, to ascertain it, - - - - - - - - - - *Ib.*
5. The right of a party to obtain a writ of *habere facias possessionem*, under the act of 1825, *ch.* 103, does not relate to the time the execution was issued, but to the time when the lands were sold, - *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. According to the law of England an administrator *d. b. n.* cannot call the representatives of the previous deceased administrator of his intestate to account, for any property of the intestate that such predecessor may have converted or wasted; nor can he claim or recover any thing but those goods and chattels and credits of his intestate which remain in specie, and are capable of being clearly and distinctly designated and distinguished as the property of the intestate. Per Bland Chan'r. *Hagthorp vs. Hook*, - - - - - 270
2. In equity an executor or administrator is considered as a trustee of the creditors, legatees, and next of kin of the deceased; is expected and required to preserve the property of the deceased apart from his own; and if he does so, the court will do every thing that can be done to assist him. Ib. - - *Ib.*
3. The only remedy at present against an administrator or his representatives for any waste or misapplication of the effects of the deceased, is by an action at law upon his administration bond, by any one interested. Ib. - - - *Ib.*
4. The authority conferred by letters of administration *d. b. n.* by our law is to administer all things described in the act of assembly as assets, not converted into money, and not distributed, delivered, or retained by the former executor or administrator under the direction of the orphans' court; and such administrator can only sue for those goods, chattels and credits which his letters authorise him to administer. Ib. - - - - - *Ib.*
5. The legal title to the chattels real, and personal estate of an intestate, vests in his administrator, who alone is considered as to them his legal representative; between the death and the granting of letters, that title is suspended and vested in no one. Ib. - - - - - - *Ib.*

See Manumission of slaves, 2.

— Action—right of, 3, 6.

FIERI FACIAS.

See Execution, 1, 2, 3.

FREEDOM.

See Manumission of slaves.

FREIGHT.

For an instance where a ship master was not permitted to retain money received as freight in a foreign country, when in point of law he had not earned it, though he had in fact delivered his cargo—*See* shipping, 8, 9, 10.

GUARANTY.

See Nudum pactum, 1.

HABERE FACIAS POSSESSIONEM

See Execution, 5.
— Purchaser, 7.
— Court of Chancery, 44, 45.

IMPROVEMENTS.

See Court of Chancery, 22, 23.

INCORPOREAL HEREDITAMENTS.

See Way—right of, 1, 2, 3, 4.
— Acts of Assembly, 2.

INFERIOR JURISDICTION.

1. Every inferior jurisdiction, whether created by a public or a private law, is subject to have its proceedings inspected either by appeal or by *certiorari* and *mandamus* where such jurisdiction acts judicially. They will be coerced to perform their duties, and restrained and confined within their proper limits as prescribed by law. Per Archer, J. *Williamson vs. Carnan,* - - - - - - - - - 196
2. Where these jurisdictions act in a summary manner, or in a new course different from the common law, a *certiorari* is the peculiar and appropriate remedy; as in such a case, a writ of error will not lie. Per Archer, J. - - - - - - *Ib.*
3. A *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdictions have exceeded their bounds. Per Archer, J. *Ib.* - - - - - 197
4. A *certiorari* will lie after judgment, where the jurisdiction proceeds in a summary manner, and in a course different from the common law. Per Archer, J. - *Ib.*
5. A *certiorari* may issue even after judgment executed, where a limited authority has been transcended by inferior jurisdictions, in cases where no writ of error lies, for the purpose of quashing their proceedings. Per Archer, J. - - - *Ib.*

See Levy Court.
— Court of Chancery, 4.

INJUNCTION.

See Court of Chancery, 1, 2, 3, 5.
— Appeal, 1.

INSOLVENT DEBTOR.

Where an applicant for a discharge under the acts relating to insolvent debtors, fails to appear according to the condition of the bond taken from him, an action in the name of the State, (the obligee) for the use of a creditor, may be maintained thereon, against the applicant's security in the bond. The pleadings must disclose, that the equitable plaintiff was a creditor of the insolvent, to a certain amount; and the applicant's failure to appear. The amount of the creditor's debt, is the measure of damages; and neither the poverty of the applicant, nor the fact that no allegations were filed against him by creditors, constitutes a defence thereto. *Kiersted, &c. vs. The State, use &c.* - - - - - - - - 231

See Construction, 3.

JUDICIAL POWER.

See Constitutional Law, 5, 7.

JURISDICTION.

See County Court.
— Inferior Jurisdiction, 1, 2, 3, 4, 5.
— Court of Chancery, 4.
— Appeal—right of, 1, 2, 3.
— Action, 3, 6.
— Constitutional Law.

JURY.

It is the unquestionable and exclusive right of the jury to decide on facts, of the existence of which, contradictory testimony is adduced. *Pawson vs. Donnell,* - - - - 1

JUST ALLOWANCES.

1. Under the head of just allowances, it has long been the course of this court, to allow a trustee or mortgagee in possession, for all necessary expenses incurred for the defence, relief, protection and repairs of the estate. And when a mortgagee thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he should be allowed the value of them. Per Bland, Ch. *Hagthorp vs. Hook,* 270
2. The estimate of the value of such

lasting improvements, is to be taken as they are, at the time of accounting, or passing the final decree; and in charging rents and profits, the estimate must not include those arising exclusively from such improvements, Ib. - - - - - - *Ib.*
See Court of Chancery, 22, 23.

LANDLORD AND TENANT.

1. G, a *feme sole*, contracted with the plaintiff to let him sow a field in grain, and he agreed to give her one third of all the grain raised, as *rent.* The plaintiff went upon and sowed the field in rye. The defendant, who after the making the contract, intermarried with G, entered upon the field, refused the plaintiff permission to cut the crop, and afterwards cut it himself and carried it away. In an action of *trover* for the value of the rye, it was held that the contract between G and the plaintiff, clearly constituted them landlady and tenant; and that the plaintiff was entitled to recover. *Hoskins vs. Rhodes*, - - 266
2. The reservation of rent *eo nomine* necessarily constitutes a lease. *Ib.*

LEASE.

The reservation of rent *eo nomine* necessarily constitutes a lease.—*Hoskins vs. Rhodes*, - - - - 266

LEGISLATURE.

See Constitutional Law.

LEVY COURT.

1. The Levy Court is the sole and proper tribunal to which the laws have confided the adjudication of the question whether the public convenience requires an alteration in a public road. Per Archer, J. *Williamson vs. Carnan*, - - 196
2. *The Levy Court of Baltimore County*, in their power to open and alter roads, is a tribunal of limited jurisdiction, proceeding in a summary method, and in a course unknown to the common law; in their confirmation of the return of the commissioners, under the act of 1821, *ch.* 152, in relation to roads, they act judicially and not ministerially. Per Archer, J. *Ib.* - - - - - - - - - - - 197
3. Without the notice required by the act of 1794, *ch.* 52, they have no power to open, amend, alter, change, widen or straighten a road. Ib. - - - - - - - *Ib.*
4. Until a *number* of inhabitants petition for a road under the act of 1821, *ch.* 152, they have no power to appoint a commissioner, or to pronounce a judgment on any return of commissioners. Ib. - - *Ib.*
5. The notice required by law of an intended petition to alter a road, should correspond with the time when a legal petition was first preferred to the Levy Court. Ib. - *Ib.*
6. The notice being to March term, and no petition within the meaning of the law until July, it was not such as is required by law. Ib. *Ib.*
7. A notice in conformity with law cannot be presumed, when the papers and record returned show an illegal and insufficient one. Ib. *Ib.*
8. Where there is no notice within the meaning of the law conferring power on the Levy Court, its whole proceedings are *coram non judice* and void. Ib. - - - - - - *Ib.*

See Inferior Jurisdiction, 1 to 5.

LIQUIDATED DAMAGES.

See Damages, 2, 3.

MANUMISSION OF SLAVES.

1. By a devise in the following words, viz. "likewise my negro man *Charles* to be free on the 1st day of January, 1827, on condition that he pay the sum of ten dollars annually, to my before named sister M, so long as *he* lives," it was the intention of the testator, who died in 1825, that the slave mentioned in the devise should be free on the 1st January, 1827; and it could not have been his intention that the condition mentioned, should have been performed by *Charles*, precedent to that day, as the acts to be done consists of payments to be made by him annually, as long as he may live. *Miller vs. Negro Charles*, - - - - - - 390
2. Upon a petition for freedom by a negro claiming his right to manumission, under a last will and testament, against the executor of his deceased master, the parties agreed upon a statement of facts,

which did not disclose whether the testator left assets sufficient for the payment of his debts or not; *held* that the objection to the manumission arising from the insufficiency of assets was not before the court, - - - - - - - - - *Ib.*

MAYOR AND CITY COUNCIL OF BALTIMORE.

1. Under the 2d sec. of the act of 1797, *ch.* 54, the power given to the *Mayor and City Council of Baltimore*, "to tax any particular part or district of the city, for paving the streets, lanes or alleys therein, or for sinking wells or erecting pumps, which may appear for the benefit of such particular part or district," is not confined to any particular description of benefit—such as the ordinary benefit and advantage of paved streets. The perservation of the health of such particular part of the city, is a benefit within the meaning and scope of the act. *The Mayor and City Council of Baltimore vs. Hughes,* 480
2. The legality of laying such tax, does not depend upon whether the paving does, or does not in fact, benefit the particular district taxed, but upon the object, the motive of the corporation in causing the paving to be done, - - *Ib.*
3. In an ordinance providing for such paving, and the imposition of such a special tax, it is not necessary that it should be expressly stated to be for the benefit of the particular district; if nothing appears to the contrary, such an exercise of the special taxing power will be taken to have been in pursuance of the authority given by the charter, - - - - - - *Ib.*
4. But where an ordinance provides for the paving of a street, &c. in a particular district, and the imposition of a special tax for that purpose on such district, which paving *appears from the ordinance* to be for the general benefit of the city, and not for the benefit of the particular district, it is not in pursuance of the authority conferred by the charter, and is void, - - - - - *Ib.*
5. So upon the construction of the 13*th sec.* of the ordinance of the 9*th March*, 1807, which declares "that if the *Commissioners of Health* shall, at any time report in writing to the *City Commissioners*, that a nuisance exists in any street, lane, or alley in the city of *Baltimore*, which will endanger the health thereof," &c. it was held that the word *thereof* does not relate to the city of *Baltimore*, so as to make it mean a nuisance which will endanger the city, but that it relates to any street, lane or alley, &c. and means a nuisance that will endanger the health of such street, &c. and the ordinance is clearly within the power conferred by the charter, - - *Ib.*
6. A corporation must act within the limits of its delegated authority, and cannot go beyond it, yet it ought not by construction be made to mean what is not clearly expressed, but when its ordinances will admit of two constructions, they should receive that which is consistent with the power given, and not that which is in violation of it, *Ib.*
7. Where one board of commissioners, in the execution of their duties, were required to report in writing to another board of commissioners, who thereupon were to do certain acts; and these boards were subsequently united without any change being prescribed as to the mode of discharging the trusts formerly confided to each of them, the formality of a written report as above directed, was necessarily dispensed with, - - - - - *Ib.*
8. Under the 13th section of the ordinance of the 9th March, 1807, the City Commissioners and Commissioners of Health, were required to form a positive and decided opinion that "a nuisance exists" in some "street, lane, or alley in the city of *Baltimore*, which will endanger the health thereof"—An entry in their books of their decision is not required. Certificates in their warrants, which they are directed to issue for the collection of the tax imposed to remove the nuisance, of the existence of the nuisances and of their characters would be sufficient; but where they say in each warrant that they conceive the street mentioned, to be in a state of nuisance, which might endanger the health of the city, thus referring to the health of the

city generally, not to that of a particular part, it is not such an opinion as the ordinance requires, and the tax imposed under it cannot be enforced, - - - - - - *Ib.*

9. The imposition and assessment of a tax by the *Mayor and City Council of Baltimore*, under and in pursuance of their charter, creates a legal obligation to pay such tax, on which the law raises an implied *assumpsit* by the person taxed. *Dugan vs. Mayor and City Council of Baltimore*, - - - - - - - - 499

10. By the charter of the city of *Baltimore*, (act of 1796, ch. 68, sec. 10,) it is provided "that the person or persons appointed to collect any tax imposed by virtue of the powers granted by this act, shall have authority to collect the same by distress, and sale of the goods, and chattels, of the person chargeable therewith," and by the ordinance of the corporate authorities of that city of the 27th March, 1817, a tax was imposed, and the collector directed to deliver to each taxable person, an account of his assessment and tax in writing, before a given day; and if the tax should not be paid within a month thereafter, to proceed without delay to recover it agreeably to the mode prescribed by the act of incorporation. In an action brought by the *Mayor and City Council of Baltimore*, to recover a tax imposed by the ordinance of 1817, it was held unnecessary to prove, that the collector had delivered the account before mentioned to the defendant; and that his liability to be sued, in no manner depended upon the diligence or negligence of the collector, - - - - - - - - - *Ib.*

MONEY HAD AND RECEIVED.

Whether ship owners are entitled in equity and good conscience, to retain money received on account of freight, is clearly a question not to be left to the jury; but proper only to be decided by the court, under the circumstances of each case.—*Wirgman's Adm'r vs. Mactier*, 150

See Assumpsit, 1, 2, 3.

MONEY PAID, LAID OUT, AND EXPENDED.

See Assumpsit, 1, 2, 3.

MORTGAGE.

See Court of Chancery, 8, 36.

MUNICIPAL CORPORATION.

See Mayor and City Council of Baltimore.

NEGROES AND SLAVES.

See Manumission of slaves, 1, 2.

NOTICE.

Where the papers and record sent from an inferior to a superior tribunal, shewed an illegal and insufficient notice to give such inferior tribunal jurisdiction of the cause, the superior tribunal is not at liberty to presume that a notice in conformity to law was given. Per Archer, J. *Williamson vs. Carnan*, 196

See Pleas and Pleading, 3.
— Purchaser, 1, 2, 3, 4.

NUDUM PACTUM.

The endorsement of T on the promissory note of E payable to A, as follows, "I hereby guarantee the ultimate payment of the within note," is void for want of consideration; and under the plea of *non assumpsit* to a declaration founded upon that guaranty, the objection to the want of consideration may be taken. *Aldridge & Higdon vs. Turner*, - - - - - - - - 427

ORDINANCES OF THE CITY OF BALTIMORE.

See Mayor and City Council of Baltimore.

PAROL EVIDENCE.

See Evidence, 2, 4.

PARTITION.

1. Upon a merely equitable estate no writ of partition can be maintained at law. *Coale, et ux. vs. Barney, et ux.* - - - - - - - - - - 324

2. To obtain a partition of land in equity, the complainant must allege and establish a seisin in himself.—*Warfield vs. Gambrill*, - - - 503

See Wills, 1.

PENALTY.

See Damages, 2, 3.

PETITION FOR FREEDOM.

See Manumission of slaves, 1, 2.

PLEAS AND PLEADING IN EQUITY.

See Court of Chancery, 9, 11, 12, 13, 15, 17, 24, 25, 26, 43.

PLEAS AND PLEADING.

1. In an action against the maker of a note payable at the house of the payee and plaintiff, on a certain number of days after date, no demand of payment is necessary to be averred or proved. *Bowie use of Ladd vs. Duvall,* - - - - 175
2. A breach on an insolvent debtor's bond taken for his appearance under the act of 1805, ch. 110, which disclosed that the equitable plaintiff was a creditor of the insolvent at the time of his application for relief, to a certain amount, and the applicant's failure to appear according to the condition of the bond is sufficient. *Kiersted, &c. vs. The State use, &c.* - - - - - - - - 231
3. In assigning a breach of the condition of a trustee's bond for the sale of a deceased person's real estate, notice to the trustee of the Chancellor's distribution of the proceeds of sale, (where the action is by a creditor to recover his portion thereof,) must be averred. *Clarke vs. Belmear,* - - - - . - 450
4. In an action of replevin, where the defendant avowed for rent in arrear, the plaintiff cannot rely upon the fact that the distress was not made in due time after the termination of the lease, unless it be pleaded as a defence. *Chappellear's Ex'rs vs. Harrison,* - - - - 477
5. A tax imposed by a municipal corporation cannot be recovered on a count for money paid, laid out and expended, although such corporation has paid the cost of the improvement for which the tax was created. *Mayor and City Council of Baltimore vs. Hughes,* - - 480

PORT WARDENS OF BALTIMORE

The Port Wardens of Baltimore by the act of 1783, ch. 24, were authorised to grant permissions to make wharves, but in order to vest a title in any such wharf it is essential by the act of 1745, ch. 9, sec. 10, that the grantee should have completed it according to his permission. *Giraud's lessee vs. Hughes,* 249

POSSESSION.

See Execution, 5.
— Purchaser, 7.
— Court of Chancery, 44, 45.

PRACTICE.

It is the unquestionable and exclusive right of the jury to decide on facts, of the existence of which, contradictory testimony is adduced. *Pawson vs. Donnell,* - - - - 1

PRACTICE IN CHANCERY.

See Court of Chancery, 1, 2, 3, 6, 10, 12, 13, 14, 16, 25, 26, 27, 37, 38, 42, 43, 44, 45.

PRINCIPAL AND AGENT.

As to ship masters, and supercargoes and consignees in foreign ports—See shipping, - - - - - 1 to 7

PROMISSORY NOTE.

1. The statute 3d *and* 4*th Anne, ch.* 9, declares that promissory notes shall be assignable or endorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and power is by the same statute given to endorsees, to maintain actions against the drawers, or prior endorsers of such notes, in the same manner as in cases of inland bills of exchange. *Bowie use of Ladd vs. Duvall,* - - - - - - - 175
2. By this statute, bills of exchange and promissory notes are placed on the same footing, and the law applicable to bills, is in general applicable to promissory notes, *Ib.*
3. When a bill of exchange is endorsed in full, all the legal interest is transferred to the endorsee, and having the legal interest, he alone is qualified to maintain an action on such bill. He cannot use the name of the payee, because the payee having transferred his interest, can have no competency to maintain an action, - - - - *Ib.*
4. So where it appeared that the note of the defendant, payable to B or order, had been endorsed as follows, "I assign the within for value received, to L;" signed B, but which endorsement was erased just before the jury was sworn; it was held that an action in the name of B, originally instituted for the use of L, could not be maintained, upon

the note, as there was no evidence from which the jury could infer that the payee and plaintiff was the holder of the note; neither could an action be maintained on the money counts, although there was proof of an express promise to pay the sum demanded in such suit, as that must be considered as enuring to the benefit of him who had a right to the note, - - *Ib.*

5. If a note duly endorsed in full, should, in the regular course of commercial dealing, come back to the hands of a prior endorser, or of the payee, it would be competent for such person as the holder, to strike out the endorsement, and sue in his own name, - - - *Ib.*

6. In an action against the maker of a note, payable at the house of the payee and plaintiff, on a certain number of days after date, no demand of payment is necessary to be averred or proved, - - - - *Ib.*

7. The endorsement of T, on the promissory note of E payable to A, as follows: "I hereby guarantee the ultimate payment of the within note," is void for want of consideration; and under the plea of *non assumpsit* to a declaration founded upon that guaranty, the objection to the want of consideration may be taken. *Aldridge & Higdon vs. Turner*, - - - - - - - - 427

PURCHASER.

1. A purchaser for a valuable consideration, without notice, will not be disturbed in equity. Per Bland, Chan'r. *Hagthorp vs. Hook*, - 270

2. A purchaser with a knowledge of trust becomes himself a trustee, and stands in the place of the vendor under whom he claims. Ib. *Ib.*

3. A purchaser with notice, from another purchaser without notice, may protect himself by the want of notice in his vendor, Ib. - *Ib.*

4. When a purchaser cannot make title, but by a deed which leads him to a knowledge of the fact; and more especially, when the deed by virtue of which he takes, recites, or directly refers to the instrument, in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a purchaser with notice, Ib. - *Ib.*

5. A purchaser at sheriff's sale is entitled to the benefit of that officer's return both to the *fieri facias* and *venditioni exponas*; and when the description of the subject levied on, according to the schedule returned under the first writ is defective, it may be amended and rendered certain by the return of the sheriff's proceedings under the second writ. *Clarke vs. Belmear*, - - - - 443

6. A purchaser under a judicial sale has a right to resort to the whole proceedings under which his title accrued, to ascertain it, - - *Ib.*

7. It is the common practice where a purchaser under a decree in Chancery is kept out of possession, by the former owner, for the Chancellor to interpose the authority of that court, and cause the possession to be delivered up. *Gowan vs. Sumwalt*, - - - - - - - - - - 511

See Execution, 5.

RENT.

See Landlord and tenant, 1.
— Replevin.

REPLEVIN.

In replevin the defendants avowed for rent in arrear due to them as Executors of C, from the plaintiff as tenant to their testator, for the term of two years ending on the 31st December, 1820; and averred that the plaintiff still remained in possession of the rented premises. The plaintiff pleaded 1st, that he did not possess and enjoy the premises under a demise from C, as his tenant, in manner, &c. 2d, that C did not demise the premises to him in manner, &c. 3d. No rent in arrear. Upon these pleas issues were joined, and on their trial in addition to proof of the avowry, it appeared that C died in *March*, 1820; that on the 1st January, 1821, the avowants rented the same premises to the plaintiff for the year 1821, and as executors of C made their distress for the rent of 1819-20—nineteen months after the termination of C's lease, and while the plaintiff was in possession under the demise of the avowants. The County Court instructed the jury, that the distress not having been made within six months next after the termination of the demise by C, and the avowants having before the time of making their distress, made a new lease to the plaintiff, they must find a verdict for him. *It was held upon appeal*, that no question as to the right of the avowants as executor's of C, to make a distress for rent falling due under a demise by him, either before or after his death arose upon this record; that whether the distress was made in due time or not, was not in issue by the pleadings, and that the instruction to the County Court was erroneous. *Chappellear's Ex'rs vs. Harrison*, - - - - - - - 477

RIPARIAN PROPRIETOR.

See Ejectment, 2, 3.

ROADS.

See Levy Court.

SET-OFF.

See Damages, 2, 3.

SHERIFF.

See Execution, 1, 2, 3.

SHIP MASTER.

See Shipping, 1 to 7, 9, 10.

SHIPPING.

1. The owner of the ship and cargo has the uncontrolled power of breaking up, or changing the voyage. *Pawson vs. Donnell*, - - 1
2. The principles which should govern such a case in the absence of all commercial usage on the subject, and by which the effect of its action on the contract of the ship master or supercargo with the ship owner is to be determined are, 1st. If by the exercise of this privilege a special injury is done to either, the ship owner must bear the loss, and make a reasonable indemnity. 2nd. If by the change of the voyage the captain or supercargo be necessarily discharged from the performance of all the duties for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished. 3d. If a part of the duties have been executed, then such a proportion of the stipulated compensation should be allowed, as appears just, on comparing the services rendered, with those which remain unperformed. For the interpolated part of the voyage, the usual compensation must be paid. The parties should be placed, as nearly as may be, in the same condition in which they would have stood, had a previous contract for the voyage as changed been entered into between them. To all the customary emoluments of a captain, or supercargo, on such a voyage, are those officers respectively entitled, - - - - - - - - - *Ib.*
3. A ship master who was also the supercargo, was directed to proceed with his ship to several ports; his compensation, in addition to monthly wages, was to be a sum certain, with the privilege of bringing home a specific quantity of merchandize from one of such ports. After a part performance of the voyage, the ship owner changed its direction, and shortened it; so that the port at which the privilege might have been exercised was not visited by the ship; before the termination of the voyage the ship master died. Held, that the privilege was so inseparably connected with the vessel's destination to the particular port at which it was to have been exercised, that upon its ceasing to be one of the *termini* of the voyage, the privilege of necessity expired, and that the sum certain stipulated to be paid the captain had relation to the voyage as originally contemplated, and was therefore subject to abatement in the discretion of the jury. First, for the alteration of the voyage, if they believed, that the ship master's labor and responsibility were thereby lightened; and secondly, for that portion of his contemplated services, which were lost by his death, - - *Ib.*
4. The misconduct of a captain or supercargo which produces neither injury nor inconvenience to his employer, forms no defence to the payment of his wages, - - *Ib.*
5. The consignees selected by a ship master or supercargo in a foreign port, according to the usual course of trade, and in good faith, are so far the agents of the owners of the ship and cargo, that upon the death of the captain or supercargo, his representatives are not responsible for the consequences of the neglect or misconduct of such consignees,

in the execution of their agency after his death not imputable to instructions given in the life time of such captain or supercargo, *Ib.*

6. A shipment of merchandize whose exportation is prohibited, made by a supercargo for account of his principal, is at his own risk, and if seized and condemned at the place of exportation, the supercargo must bear the loss, - - - - - - *Ib.*

7. The acceptance by a ship owner of the letters and invoices sent to him by the consignees of his ship in a foreign port, is not such a ratification of the acts of those agents, as would throw a loss arising from the seizure of merchandize exported against the laws of the port of shipment by them, for his account, upon such ship owner, - - - *Ib.*

8. The owner of a ship after she was laden at *Baltimore*, on the 14th May, 1810, agreed with the shippers of the cargo, in writing, that their goods were "to be landed in a permitted port on the continent of *Europe*, (meaning that they were not to be landed at the Island of *Sylt*,) before the freight should be earned, *but should the whole of the continent be shut*, the freight, with an addition as arbitrators might determine, would be earned, should the property be landed in *England*, agreeably to the custom of the country." On the 25th April, 1810, a charter party had been entered into for the same ship, by which the owner covenanted to proceed with his ship from *Baltimore*, north about, for the Island of *Sylt*, thence to *Hamburg* or *Bremen*, if open to American ships, if not, the cargo to be landed at *Sylt*, if permitted, and in case of refusal there, thence to such permitted port in the *North Sea* or *Baltic*, as the master and supercargo might direct; and should the *Baltic* be closed against the admission of *American* vessels, then to such other port as the master and supercargo might again direct. The freight was to be paid agreebly to the bills of lading, *provided* the cargo was discharged at a port in the *North Sea;* but if delivered at any port in the *Baltic*, an advance in the freight was covenanted for; and should the *Baltic* be shut, a further advance in the freight to be settled by arbitration. On the 8th May, 1810, a bill of lading was also signed for the plaintiff's goods, which stated the ship to be bound from *Baltimore* for *Sylt*, and a permitted port in the *North Sea* or *Baltic*, the goods to be delivered at the aforesaid permitted port, unto *P* of *Hamburg*, who was not the supercargo of the ship. In an action where the plaintiff claimed under these contracts, he offered testimony to establish that certain ports in *Europe*, not on the *North Sea* or *Baltic*, were open to *American* vessels, but the court held, that looking to the historical facts and occurrences of the time, it was manifest that the voyage was undertaken, and the charter party, bill of lading, and agreement entered into, with a view to the then political state of affairs in *Europe*, and should be construed with a view thereto—that the permitted port on the continent of *Europe*, in which, the goods were by the agreement to be landed, before freight could be earned, was intended to be a permitted port in the *North Sea* or the *Baltic;* and also that all the said instruments must be construed in connexion with each other, and the general terms in the agreement of the 14th May, restricted to the *North Sea* and *Baltic;* and therefore rejected the testimony offered, as inadmissible and irrelevant. *Wirgman's Adm'rs vs. Mactier,* - - 150

9. Whether ship owners are entitled in equity and good conscience, to retain money received on account of freight, is clearly a question not to be left to the jury; but proper only to be decided by the court, under the circumstances of each case, - - - - - - - - *Ib.*

10. So where in an action of *assumpsit* brought by the owner of merchandize shipped in the defendant's vessel, to recover a sum which the defendant had received and retained for freight, it appeared that the shipment was made under the charter party, bill of lading, and agreement above referred to, and that the master was furnished with instructions from the plaintiff, as follows, "on account of the unsettled state of affairs on the continent of *Europe*, I have thought proper to request my friends Messrs. *P. & Co.* of *Hamburg*, in the event of the

cargo of the ship being denied entry at their port, to consult with you on the further destination of the ship, and the disposal of my interest on board. In case they have no friend at the port she may proceed for, you will please take charge of it, and advise with them what is best to be done for my interest. On your arrival off *Sylt*, should the situation of affairs be such as to prevent you from communicating with Messrs. *P. & Co.*, in that case you will have to proceed with the cargo where you judge it will be most advantageous for all concerned, when I shall consider my part as entirely under your charge, &c." The ship sailed on her voyage, was captured before her arrival off *Sylt*, taken into a port in *Norway*, but ultimately released. The master, after the restoration of his ship and cargo, without consulting with the consignees about the further destination of the ship, or disposition of the plaintiff's property, although he had the means of communicating with them, proceeded with his ship to *England*, there delivered his cargo, and received (from the agents who sold the cargo,) as freight, the sum claimed in this action. Held, he was not entitled to retain it, - - - - - - - *Ib.*

11. Where by the municipal regulations of certain ports, a certificate of origin was necessary to the admission of certain merchandize there, a shipmaster having received such goods on board his ship, and signed a bill of lading for their delivery at one of such ports, cannot in the absence of evidence to shew it was the duty of the shipper to furnish such a certificate, set up the fact of that document not being on board his ship, as an excuse for not entering the port at which he had agreed to land the property entrusted to him; nor as a justification for his delivering it at another port, and thereby earn freight, *Ib.*

STATE OF MARYLAND.

See Constitutional Law.
— Construction, 1, 3.

SUBSTITUTION.

Relief by the doctrine of substitution, is never extended to a security but upon the assumption that the creditor's debt has been, or is to be fully paid—that his further detention of the mortgaged property is against equity and good conscience. *Union Bank of Maryland vs. Edwards,* - - - - - - 346
See Court of Chancery, 36.

SUPERCARGO.

See Shipping, 1 to 7.

TAXES.

See Mayor and City Council of Baltimore.

TROVER.

See Landlord and Tenant.

TRUSTEE.

See Bond, 2.

TRUSTS.

See Court of Chancery, 10, 14, 16, 22, 23, 30, 31, 32, 33.

VENDITIONI EXPONAS.

See Execution, 2.

VOIR DIRE.

See Evidence, 2.

VOLUNTARY PAYMENTS.

See Action—right of, 4, 6, 8, 9.

WAY—RIGHT OF.

1. An instrument of the following tenor—"I hereby authorise R to open, and continue open, a road through my field, beginning at, &c. as also to build, keep in repair, and use a bridge over the branch, in the field on which the said road will pass, said road and bridge being intended as well for the public use, as the use of R; and to continue until R and myself shall agree it shall be shut up or altered;" executed under the hand and seal of the owner of the land, is a grant of an incorporeal hereditament, a right of way *de novo*, which will endure until both parties agree upon its discontinuance, and which must be acknowledged, and recorded according to our acts of registration. *Hays vs. Richardson,* 366
2. A right of way in *esse* may pass by deed of bargain and sale, duly acknowledged and recorded, - *Ib.*

3. A transfer of way *de novo* may be by grant or lease, but cannot be effected by way of bargain and sale, - - - - - - - - - *Ib.*
4. A right of way may be said to lie in the county where it exists, or is exercisable, - - - - - - - *Ib.*

WILLS AND TESTAMENTS.

Where G by his last will devised certain tracts of land to his three sons in fee, and also devised to his daughters, "the right, privilege and liberty of residing and living in the houses with, and using and cultivating with themselves and their negroes, stock, and of keeping their negroes, and all their other property thereon, and with them, in common with my sons, all my lands during the term that my said daughters should remain single and unmarried," it was held that the daughters did not take an estate for life, or any other less estate, in common with their brothers, which was susceptible of partition; and that the devise to them was a mere charge for their benefit upon the lands of the testator, and incapable of alienation to a stranger. PER BLAND, CHAN'R. *Warfield vs. Gambrill*, - - - 503
See Manumission of slaves, 1.

WITNESS.

See Evidence, 1, 2.

WRIT.

See Execution.

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